

**NOMINATIONS OF CROCKER NEVIN, DANIEL R.
LEVINSON, HENRY B. FRAZIER III, AND JEAN
McKEE**

**HEARINGS
BEFORE THE
COMMITTEE ON
GOVERNMENTAL AFFAIRS
UNITED STATES SENATE
NINETY-NINTH CONGRESS**

SECOND SESSION

ON THE

**NOMINATIONS OF MR. NEVIN TO BE A GOVERNOR OF THE U.S. POSTAL
SERVICE; MR. LEVINSON TO BE A MEMBER AND CHAIRMAN OF THE
MERIT SYSTEMS PROTECTION BOARD; AND MR. FRAZIER AND MS.
McKEE TO BE MEMBERS OF THE FEDERAL LABOR RELATIONS AU-
THORITY**

JULY 16 AND 17, 1986

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**NOMINATIONS OF CROCKER NEVIN, DANIEL R.
LEVINSON, HENRY B. FRAZIER III, AND JEAN
McKEE**

WEDNESDAY, JULY 16, 1986

U.S. SENATE,
COMMITTEE ON GOVERNMENTAL AFFAIRS,
Washington, DC.

The committee met, pursuant to notice, at 10:12 a.m., in room SD-342, Dirksen Senate Office Building, Hon. Ted Stevens presiding.

Present: Senators Stevens, Eagleton, Levin, and Gore.

OPENING STATEMENT OF SENATOR STEVENS

Senator STEVENS. Good morning. I am sorry to be late. I have been involved in another issue and I just couldn't get off the phone.

We are here to take testimony concerning four individuals who have been nominated by the President for appointment to three different agencies. The first nomination to be considered is for membership on the Board of Governors of the Postal Service, which is charged with the responsibility of setting the overall policy and direction for the Nation's second oldest and second largest department or agency. I am certain we are all aware of the recent resignation of a member of the Board, which serves to remind us of the importance of the process that we are involved in this morning.

The remaining three nominations are also to very important agencies. They were created by the Civil Service Reform Act and are the Merit Systems Protection Board and the Federal Labor Relations Authority. The Merit Systems Protection Board is an independent agency with a bipartisan board. Its charter is to protect and preserve the Merit Systems which are the foundation of our civil service system.

Since its creation in June 1979, that Board has handled over 80,000 cases, ranging from very small to some of the most well-publicized whistleblower cases that we have seen. They also were involved in the adjudication of some 11,000 air traffic controller cases. The Merit Systems Protection Board has earned the reputation of being a fair and impartial body and is well respected by the Federal work force and its agencies. The report of the Merit Systems Protection Board to the Office of Personnel Management on significant actions is used by all agencies as a guide to improve personnel management and administration.

There are two nominations for the Federal Labor Relations Authority. That agency, as I said, established by the Civil Service Reform Act, brought labor relations in the Federal service under that statute. Prior to that time, the authority for Federal labor relations came from Executive order.

The committee rules require that the committee conduct an inquiry into the nominee's experience, qualifications, and suitability to serve in the position for which the President has sent us a nomination.

I am not going to take the time right now to recall all the steps that the committee has taken on these nominations prior to our hearing today, but we will insert that information in the record so that there is no question that we have gone through the procedures required by our committee's rules and precedents in dealing with such nominations.

[The information referred to follows:]

The nominees have been asked for and have supplied financial statements and detailed information on education, employment, and professional achievements. They have also responded in writing to a number of prehearing questions.

Copies of the biographical information and prehearing question responses will be placed in the record as a part of this hearing and are available upon request. The financial statements are available for inspection by the public in the committee office.

The committee reviewed the nominees' biographical and financial information as well as reports submitted by the Office of Government Ethics and the General Counsels at the respective agencies to which the nominees have been appointed. Following that, acting for the chairman of the committee, I reviewed the FBI reports prepared on the nominees, which have also been reviewed by the ranking minority member, Senator Eagleton.

Mr. STEVENS. The rules specifically require that, in all such hearings such as we are having today, that all the nominees give their testimony under oath. So I would like to ask all the nominees to please stand and raise their right hands, and we will put you under oath all together. Do you solemnly swear to tell the truth, the whole truth, and nothing but the truth, so help you God?

Mr. LEVINSON. I do.

Mr. NEVIN. I do.

Mr. FRAZIER. I do.

Ms. MCKEE. I do.

Senator STEVENS. Thank you very much. Again, I apologize. My colleague, Senator Warner, was here and had a statement to make on Mr. Levinson and Ms. McKee. We will include his statements in the record. Senator Tribble also wanted to be here for the introduction of Mr. Levinson. My apologies to all of you for that, but we will have to put those statements in the record.^{1 2}

Our first nominee then will be Mr. Nevin.

TESTIMONY OF CROCKER NEVIN, NOMINEE TO BE A GOVERNOR OF THE U.S. POSTAL SERVICE

Senator STEVENS. Good morning.

Mr. NEVIN. Good morning.

Senator STEVENS. You are already under oath. Do you have a statement you would like to make?

¹ See p. 85, 88 for Senator Warner's statements.

² See p. 88 for Senator Tribble's statement.

Mr. NEVIN. No, I don't, Senator.

Senator STEVENS. Your home is in New York City?

Mr. NEVIN. Yes, sir.

Senator STEVENS. You were formerly on the Board; is that correct?

Mr. NEVIN. I was on the original Board, yes; back in 1970, I think.

Senator STEVENS. Give us a summary of what you have been doing since you left the Board.

Mr. NEVIN. I left the Board, I think, in 1977. At that time, I was an executive director of Drexel Burnham Lambert, an investment management firm. I have been on a number of corporate boards, and, in 1984, I became the chairman and chief executive officer of CF&I Steel, which is a small steel company in Colorado, and, retained a relationship with Drexel Burnham as a senior adviser.

Senator STEVENS. Are you familiar with the request of U.S. District Judge Pratt to the Board of Governors to refrain from appointing a Postmaster General before August 15, which is the scheduled departure of the current Postmaster General?

Mr. NEVIN. No, I'm not.

Senator STEVENS. Some Members of Congress have also made some suggestions concerning the appointment of a Postmaster General. They want to ask the Board to refrain from making an appointment until the completion of the indictment of and judicial process concerning the former Board member Peter Voss and investigations related to his situation.

Has anyone contacted you about the appointment of the Postmaster General?

Mr. NEVIN. No.

Senator STEVENS. Have you made any statements concerning who you would vote for as a Postmaster General if you are confirmed?

Mr. NEVIN. No, I haven't even heard any names.

Senator STEVENS. You have had no contacts at all from Members of the House or members of the committee or any Members of Congress or anyone else concerning what you would do with regard to that vacancy?

Mr. NEVIN. No.

Senator STEVENS. Have you yourself made any comments about it?

Mr. NEVIN. No, I haven't.

Senator STEVENS. I will tell you, I don't believe it is proper for us to ask you for a commitment on what you would do if you are confirmed, so I am not going to do that.

There is legislation, however, pending that would establish the Postmaster General as the Chairman of the Postal Board of Governors and would reestablish the Presidential appointment of the Postmaster General; are you familiar with that?

Mr. NEVIN. Yes, I am, to a certain extent.

Senator STEVENS. Have you expressed a view on that legislation?

Mr. NEVIN. Not in any public sense. I probably would mention to some of the staff that I had some feelings about it.

Senator STEVENS. Would you care to express your views now in that regard?

Mr. NEVIN. Yes. I have been away from the Board for 7 or 8 years, so, obviously, things may have changed. But one of the things I did feel was valuable was in the early period when the Postmaster General was also the Chairman, it was much more like a normal corporate relationship, as I remembered it, and certainly prevented the development of a couple of power centers.

I think, in a very general way, I would be in favor of combining that office. As to the appointment by the President, I'm just not really up to date enough on what's going on to express an opinion on that.

Senator STEVENS. In going over the development of the Board in recent years, I found that the Board had decided that individual members would be chairmen of subcommittees of the Board or subsections of the Board and, in effect, they each became sort of part-time chairmen by virtue of that process.

After considerable discussion with some members of the Board, it appears that the Board of Governors now has abolished that committee structure except for the audit committee. When you served on the Board, did they have those subcommittees?

Mr. NEVIN. Yes. We had an audit committee. We had, I think, I believe, a finance committee. I was chairman of the audit committee, I remember, and Fred Kappel was also on it, so I never even was allowed to call it to order. We did not really develop a power system within the Board. It was more of a normal corporate type of thing where you did have a chairman of the committee, but it—I wouldn't say they developed any life of their own at all.

Senator STEVENS. The power that Mr. Voss was able to wield to the detriment of the Postal Service came out of that subcommittee system. Have you discussed the subcommittee system or the recent action with any members of the Board?

Mr. NEVIN. No, I haven't.

Senator STEVENS. I would invite your—and I am sure you will have to give it—your real serious consideration to problems that develop from that past procedure and for yourself. I urge that you take action to assure that the power on the Board is not vested in any one person for any period of time that would lead to the problems that we had with Mr. Voss.

Are you familiar with the fraudulent travel claims that Mr. Voss has admitted that he submitted?

Mr. NEVIN. Only to the extent that I have read about it in the paper.

Senator STEVENS. On behalf of the committee, we would urge you, as a member of the Board, to make certain that there are adequate protections for the Postal Service and the taxpayers as you develop procedures for approval of travel vouchers and similar expenses.

There have also been criticisms by Members of the Congress of the appointment of outside counsel by the Board. When you were a Governor, did you have outside counsel?

Mr. NEVIN. No. We were more like a normal corporate board. We had neither counsel nor staff, and our activity, really, was conducted around the basic postal staff and the Postmaster General.

Senator STEVENS. There appears to have developed in, I would say, the last 10 years a concept of an independent entity by the

Board of Governors with their own counsel, their own employees, their own procedures. Again, I would encourage you to restore the relationship that existed in the early days of the Board to the Postal Service and to the committees of Congress that retain oversight responsibility of the Postal Service.

There are also Members of Congress that question the need for a secretary of the Board. It is my understanding there was no secretary or independent staff when you were on the Board before. Is that right?

Mr. NEVIN. No, we were totally dependent on the post office staff. We had no independent secretary.

Senator STEVENS. I am not talking about secretaries in the sense of writing letters.

Mr. NEVIN. No, I understand, corporate secretary.

Senator STEVENS. But a corporate secretary that worked only for the Board as opposed to the corporation, the Postal Service?

Mr. NEVIN. No, we did not.

Senator STEVENS. I have been asked to inquire into your views concerning the concept of micromanagement of the Postal Service by the Board of Governors. Again, I am sure you rely on your own past experience as a member of the Board, but there has been considerable criticism of the day-to-day management demands of the Board. Could you tell the committee, what do you think the role of the Board of Governors should be to the Postal Service on a day-to-day basis?

Mr. NEVIN. I guess, philosophically, I lean on what I consider a more traditional board management relationship, which finds and appoints a strong executive to run the post office, subject to evaluation of his performance and those of the people that he has delegated to run the Service by the Board. Clearly, in this case, there is an additional monitoring function in the Senate and the House.

But I think that, philosophically, I would find it very difficult as a Board member to have any in-depth evaluation of the actual operations of the post office. I think this is true of any business, let alone anything as large as this. So I don't think that is an area where I would feel the Board would have much competency in micromanaging the business. I think if it seems like it needs it, then you probably have the wrong Postmaster General. That would be my evaluation.

Senator STEVENS. You have considerable personal experience as chairman of the Board of CF&I Steel. Do you think that normal business concepts of the relationship between the Board and the management of corporations will work in the relationship between the Board of Governors and the Postmaster General?

Mr. NEVIN. That's a good question. It is a slightly different culture and atmosphere than a private or a public corporation. I think something closer to that type of relationship could work than what apparently you are referring to in the sense of micromanagement. I think the real key to it is the strength and character of your chief executive. If he is a leader and is good at what he's doing, then I think a board can function very well in what I would consider the normal, more normal corporate structure.

I think that's true in the private sector, that a strong leader and a good executive, that's how he functions best, with a board who

sets general policy and monitors his performance. I think that to the extent he's serving and is visible in as public an arena as the post office, it leads to a more fish bowl kind of relationship with the Board.

I think it probably tempts a Board, and I don't remember this specifically, but I think back in the days, the early days of the Board, that we were a little bit more in the public view than a normal corporate board. For one thing, the whole area of operating the sunshine laws came in while I was on that Board.

So I think there is more visibility and there is more, probably, public comment on the relationship, but I still think that that's probably the best place to start, trying to have a board and a management work.

Senator STEVENS. Did you serve the full term on the Board before?

Mr. NEVIN. Yes; I did, I think it was—

Senator STEVENS. Nine years?

Mr. NEVIN. No; we were staggered. I think it was six.

Senator STEVENS. Some of us have criticized the 9-year term as too long. Do you believe that there is any reason to have nine years as a member of a board of this type?

Mr. NEVIN. I guess for somebody really good, it's probably fine. If they're not so good, it's too long. I don't mean to be facetious.

Senator STEVENS. You are right.

Mr. NEVIN. I think the intention of the terms was to give continuity, which I think was very important. The concept, if I remember, was to separate it from the political swings and give some continuity of the Board. I think probably, and I haven't really thought about this, nine may be a little long. Actually, our staggered terms worked pretty well at the time.

Senator STEVENS. I thought they did, too, but 9 years goes beyond the term, two Presidential terms. It is a long term.

Mr. NEVIN. Yes; that's a long time.

Senator STEVENS. The salary of the Board of Governors is \$10,000 a year, and the per diem is \$300 for official meetings plus expenses. Many of us think that the Board meets too often but they don't get paid enough money. Do you agree with that?

Mr. NEVIN. Well, by corporate board standards, it's quite low. I understand there are trade-offs. I think the reasons you would join a corporate board are slightly different from the reasons that one might want to be involved in this. One of the earliest and longest ranging battles we had in the first Board was over the compression at the senior levels of the Post Office itself because of the cap on the Postmaster General. I think that probably is why the Board, I would say, is certainly on the low side by board standards. But I understand there are trade-offs.

Senator STEVENS. I don't know about other Members of the Congress, but I have expressed the opinion that a member of the Board of Governors, while a member, while actually a member—a former member would be another matter—should not be appointed as Postmaster General; that the Board should not select one of its own as a Postmaster General. Do you have a feeling about that?

Mr. NEVIN. I think, by and large, it would be unusual to find the best Postmaster General among the membership of what had been

on outside boards. Once in a great while, I suppose, there is somebody who is maybe giving up what else he's doing and seems to have the type of character that you want.

I don't think I would say it was impossible. I think it would be very unusual to find somebody, though, from that source.

Senator STEVENS. I had the feeling we were about ready to see that before the disclosures about Mr. Voss, and many of us did. The problem is that if the Board has the power to remove the Postmaster General, it could develop into a very serious situation if the Board removed the Postmaster General and then appointed one of its own members to take his place or her place. It is still possible that a woman could be appointed. Are you seeking the Postmaster General's position?

Mr. NEVIN. Me? [Laughter.]

Senator STEVENS. We intend to get tougher, I might say, in our relationships with this Board, because the Board got off the reservation, in my opinion, in the last few years. It is time now that we reign the Board in. I am really serious. Do you seek the position of Postmaster General as you seek to become a member of the Board?

Mr. NEVIN. Absolutely not.

Senator STEVENS. Good. Happy to hear you say that.

Again, I don't wish to be getting to the point where it seems that I am seeking to embarrass you, but I have been told that there are some financial difficulties for CF&I; is that right?

Mr. NEVIN. It certainly is.

Senator STEVENS. Is there anything that you know in relationship to CF&I and your service as chairman of the board that could develop to embarrass the Postal Service if we confirm your nomination as the President has submitted it to us to become a member of the Board?

Mr. NEVIN. Well, I think, given the state of the steel industry, there certainly is at least a possibility of a chapter 11 filing by CF&I Steel.

Senator STEVENS. That wouldn't be an embarrassment. I am talking about any problem concerning you personally. Have there been any allegations concerning your personal relationship that have led to these financial difficulties?

Mr. NEVIN. I don't think so. I can't think of any.

Senator STEVENS. No one has commented to you so far? You know of no such allegations?

Mr. NEVIN. No.

Senator STEVENS. Have you had any dealings at all with the Recognition Equipment Co. of Dallas, TX?

Mr. NEVIN. Not personally. I vaguely remember that. Are they the optical scanner people?

Senator STEVENS. Yes; that's right.

Mr. NEVIN. Back in the early days of the board, when we were first looking at optical scanning, I believe the name came up, but I have had no personal contact with them.

Senator STEVENS. One of the charges made against former Governor Peter Voss is that he conspired with certain individuals to have a sole-source contract for their optical character reader and that he was to profit from such a relationship. You haven't had any personal relationship with that company?

Mr. NEVIN. No.

Senator STEVENS. To your knowledge, has CF&I had any dealings with that company while you were chairman of the board?

Mr. NEVIN. No.

Senator STEVENS. Thank you very much. I am required by our rules to ask three questions of each nominee, so let me ask this of you. Is there anything that you are aware of in your background which might present a conflict of interest with the duties of the office to which you have been nominated?

Mr. NEVIN. No, there isn't.

Senator STEVENS. Do you know of any reason, personal or otherwise, that would in any way prevent you from fully and honorably discharging the responsibilities of the office to which the President seeks to have you confirmed?

Mr. NEVIN. No, sir.

Senator STEVENS. If you are confirmed, do you agree without reservation to appear and testify before any duly constituted committee of the Congress?

Mr. NEVIN. Yes, sir.

Senator STEVENS. Thank you very much.

Gentlemen, do you have any questions?

Senator GORE. Go ahead.

Senator LEVIN. Mr. Chairman, I just have a few questions of Mr. Nevin. One refers to the private express statutes that are now on the books. Do you believe that those statutes should be retained?

Mr. NEVIN. Well, I remember all the arguments pro and con, and as I basically understood and agreed, that if you have to have universal postal service, that you do run the risk of having the private carriers skim the cream and that the long-run result will be a more expensive post office having to deal with areas that the private carriers don't want.

I have not examined this issue in detail since I left the Board, and to the extent that there are different arguments and changes in what's happening out there, I would modify that opinion. But when I left the Board, I believed in the validity of the private express statutes.

Senator LEVIN. And you don't know of anything that has changed?

Mr. NEVIN. I really don't. I know there are a lot more people getting into fringes of it, but I don't know what is really happening.

Senator LEVIN. Are you supportive of continued Federal funding for the revenue forgone subsidy?

Mr. NEVIN. The revenue forgone subsidy basically was for congressional mail and stuff like that, wasn't it?

Senator LEVIN. It is a lot of mail for nonprofits, libraries, and so forth. We mention congressional at the end. [Laughter.] That is the et cetera. [Laughter.]

Mr. NEVIN. Exception, the et cetera.

Well, the original concept, I think, was some horse trading in order to get the new post office established. I think some of that had to do with the revenue forgone. It's a kind of a social question, in a sense. I think that I would believe philosophically in any pure post office that paid its own way. On the other hand, there are

some social costs to take a look at. I guess in general, I don't have any real quarrel with that.

Senator LEVIN. There has been a problem with morale in the Postal Service following the problems with Voss and some other senior executives who have been convicted of being involved in kickback schemes. What do you propose to do to improve and help the morale in the Postal Service following these disclosures and convictions?

Mr. NEVIN. Well, I would hope to be part of a Board where myself and my fellow Board members wouldn't even be suspected of activity like that. I don't know quite how you accomplish that.

Senator LEVIN. How about in terms of morale of the employees of the Postal Service?

Mr. NEVIN. I would think it would be a very serious problem, and I think that a lot of it we are now coming to the stage, as I understand it, where Al Casey is going to leave, and there will be a new Postmaster General, and I think that will be a very key part of what he's got to accomplish, is to restore that morale.

I think it is—I don't know how you persuade the world that you're a person of character, but I think it's clearly what the Board has to establish.

Senator LEVIN. So you don't have any particular plan or program to address the problems which have been created in the wake of those convictions?

Mr. NEVIN. Not really. I'm not sure there is a program to use.

Senator LEVIN. Thank you, Mr. Chairman.

Senator STEVENS. Senator Gore?

Senator GORE. Thank you, Mr. Chairman, and welcome, Mr. Nevin.

I am impressed by your responses to the questions that have been asked by my colleagues, and I want to use my brief time to simply underscore the concerns expressed by the chairman. As the ranking Democratic member of the Civil Service, Post Office, and General Services Subcommittee, I would like to impress upon you that there is bipartisan concern on this committee, on our counterpart committee in the House, and broadly, among the membership of both the House and the Senate about the conduct of the Postal Board of Governors.

The Board is, in a real way, on thin ice. This committee is extremely distressed at some of the events that have taken place and the way in which the Board has conducted its business, and I would hope that following your confirmation, you would take to the Board a keen awareness of the attitude in the Congress about what has been going on there.

This would, in normal times, be treated as a routine confirmation because of your background and your qualifications, intelligence, ability, et cetera. But as the questions posed by the chairman make quite clear, we are not treating any nomination to this Board as a routine matter, and we are not treating our relationship with the Board as a routine function.

The Board is not performing in the way it should. Serious questions have been raised, and as a result, in this confirmation process, we want to impress upon you and upon current members of the Board the degree of concern that is felt throughout the Con-

gress. If remedial actions are not taken, then the blunt instrument of law will have to be used in order to secure appropriate changes.

In fact, some proposals, sensible, in my view, have already been made with respect to upgrading the position of the Postmaster General and trying to get rid of some of this micromanagement which is part, but only part, of the problem that has been perceived here on the Hill.

So I, as I said before, I don't have a quarrel with your nomination, but I join my colleagues in expressing concern about the general course taken by the Board in recent times, and I hope that upon confirmation, you would help to change that course.

Mr. NEVIN. I hear you.

Senator GORE. All right.

Thank you, Mr. Chairman.

Senator STEVENS. Thank you very much, Mr. Nevin. I want you to know I have looked through the information you have provided in response to the normal requests that are given to nominees. I am pleased to see that the President has nominated you for additional service and that you are willing to serve on this Board. The Board needs people of your capabilities and background. I note that you have been not only active in the Democratic Party, but you have made substantial contributions to the Democratic Party.

I absolutely believe that bipartisanship means that the person selected by the President of a party that he does not represent means what it says: That they should be active and vital members of the party of their choice. So, I congratulate the President, too, for sending us your name.

Senator GORE. We appreciated the activity, too. [Laughter.]

Senator LEVIN. And we want to congratulate you on the contribution part, particularly. [Laughter.]

Senator STEVENS. Well, I say that because I sat here in other years, Mr. Nevin, and I know who was appointed in the days when Republicans should have been nominated.

Senator GORE. That hasn't been unknown in this administration. [Laughter.]

Senator STEVENS. But I am pleased to see that we are restoring the example that I believe ought to be followed in this regard, and I think everybody on the Hill appreciates it. We stand up and are counted on our side. Everybody knows that we are very active in our own party structures. I am pleased to see that you will be an active member of the Board on a bipartisan basis. Thank you very much for your frank answers to our questions, I assure you, we are going to see more of the Board than we have in the past.

Mr. NEVIN. Thank you.

Senator STEVENS. Thank you very much. I understand, Mr. Nevin, that you recall our procedures that if other members involved in other committees have specific questions, they will submit them and ask you to respond.

Mr. NEVIN. Yes.

Senator STEVENS. The next nominee is Mr. Levinson.

TESTIMONY OF DANIEL R. LEVINSON, NOMINEE TO BE A
MEMBER AND CHAIRMAN OF THE MERIT SYSTEMS PROTEC-
TION BOARD ³

Senator STEVENS. You are already sworn in, Mr. Levinson, and you are here to be a member and the Chairman of the Merit Systems Protection Board, correct?

Mr. LEVINSON. Yes, sir, Mr. Chairman.

Senator STEVENS. You have not served on this Board before?

Mr. LEVINSON. No; I have not.

Senator STEVENS. Have you had any relationship with the Board before?

Mr. LEVINSON. I have had no formal relationship with the MSPB, but I have worked on MSPB-related matters in the past.

Senator STEVENS. We have put in the record your general background, but just summarize it for us. You are coming to us now from the Office of General Counsel of the Consumer Product Safety Commission; is that right?

Mr. LEVINSON. That's correct, Mr. Chairman.

Senator STEVENS. What is your general background?

Mr. LEVINSON. By training and experience I am an employee relations lawyer. I am a graduate of Georgetown Law School, and George Washington University with an LL.M. in labor law; practiced over 6 years in the private sector in the employee relations field before joining the Office of Personnel Management as the deputy general counsel where I served for 2 years. And most recently, I have been serving as general counsel of the Consumer Product Safety Commission.

Senator STEVENS. There is legislation pending before the Congress now to provide additional protection for whistleblowers. We thought we had provided that protection. Do you think that if the Merit Systems Protection Board performs its function, additional legislation to protect whistleblowers is needed?

Mr. LEVINSON. At least the most recent indications from the special counsel's office itself would suggest that added reforms may not be needed. I believe the special counsel who just left that office felt strongly that the office, although it had gone through a couple of difficult years early on, had been performing quite well these past several years as evidenced by the approximately 60 or so cases it has brought, most of them resolved by corrective action.

So the sense that I'm getting from the special counsel's office, at least under the tenure of the former special counsel, is that the office is working well.

Senator STEVENS. Have you expressed any views concerning mandatory drug tests of Federal employees?

Mr. LEVINSON. No, sir; I have not.

Senator STEVENS. Do you have an opinion now about the issue concerning mandatory drug tests as far as your role as the Chairman of the Board is concerned? Do you have a prior, fixed opinion concerning that?

Mr. LEVINSON. I do not, Mr. Chairman.

³ See p. 98 for Mr. Levinson's prepared statement.

Senator STEVENS. Have you reviewed the problems facing the Board now?

Mr. LEVINSON. Yes, I have had an opportunity to look at the annual reports of the Board and to talk at least informally with some of the leadership of the Board, so I am somewhat familiar.

Senator STEVENS. What are the major problems faced by this Board now?

Mr. LEVINSON. Well, after talking with the two members of the Board, and based on my own experience in this field, I believe that one of the most difficult problems facing the Board is how to resolve the mixed case in a more expeditious way.

As you know, Mr. Chairman, the mixed-case procedure is set out in statute and is designed to resolve those cases that bring both EEO and adverse action matters together in one case.

The procedures to resolve such mixed cases are very complicated, unduly so, I believe. The first mixed case that went the full procedural route up to the special panel created by the statute took 4 years before even the opportunity for judicial review, and I think the second case that is now going through that process is in its fifth year.

I think these are unduly lengthy proceedings and there needs to be something done both by MSPB and by the other agencies involved, most particularly EEOC, to come to some understanding on how the process can be expedited.

Senator STEVENS. You have a very distinguished record in your legal background. I am pleased to see that. You have met the other members of the Board?

Mr. LEVINSON. Yes, sir; I have.

Senator STEVENS. Do you know of any conflicts you would have with them?

Mr. LEVINSON. No; I see no conflicts.

Senator STEVENS. Have you known the members of this Board before?

Mr. LEVINSON. I did not know the Acting Chairman before being nominated by the President. I have previously met Member Devaney three or four times during my tenure as Deputy General Counsel of OPM, on a social or a professional basis.

Senator STEVENS. There is great concern over the implementation of performance-based incentive systems for Federal employees. Have you expressed views on those types of systems?

Mr. LEVINSON. No; I have not, Mr. Chairman.

Senator STEVENS. Have you been involved in any way with the performance-based concept in your position with the Consumer Protection Agency?

Mr. LEVINSON. No.

Senator STEVENS. You were mentioning the whole question of these mixed cases. I am familiar with the *Ignaccio* case.

Mr. LEVINSON. That was the first case I was referring to.

Senator STEVENS. The typical problem is going to develop. As I understand it, the final decision was that the EEOC's position was upheld in that Mr. Ignaccio was entitled to continued employment since he was no longer able to perform the work as a Postal Service letter carrier. EEOC had ruled that he was entitled to another position that he could perform. You are familiar with that?

Mr. LEVINSON. Yes; I am. I'm not familiar with all of the details of the case, Mr. Chairman, but I'm generally familiar with the case.

Senator STEVENS. I am interested in the requirement for reassignment of handicapped employees, which I don't think this committee or the Congress would disagree with. But, there are some handicaps, it is becoming apparent, that are self-inflicted, alcohol and drug abuse, for instance.

Have you expressed any position concerning the reassignment of employees that are handicapped because of voluntary actions of their own?

Mr. LEVINSON. No, sir; I have not.

Senator STEVENS. Do you believe a distinction could be made between a handicap that has developed as a result of accident or other conditions versus being self-inflicted?

Mr. LEVINSON. I think it might be possible, but it's a very difficult area to make what would be considered very crucial distinctions. There is a certain body of expertise that would suggest that in the areas of drug use and alcoholism, that at times, such conditions are not completely voluntary.

Senator STEVENS. Another subcommittee of this committee held hearings yesterday on the use of "crack" and I personally have just returned from a visit to the west coast where I was viewing some of the developments in terms of our ability to interpret the brain and saw the brain scan of some people who had used cocaine excessively. They are handicapped.

I suggest to you that the Congress is going to be very interested if your Board or the EEOC started imposing upon the taxpayers the duty to support for life those who have self-inflicted handicaps. I particularly want to tell you that our subcommittee is going to keep track of that. I'm concerned that if it becomes known that all you have to do is start using crack and you will have a taxpayer supported position forever, pursuant to the *Ignaccio* case, that we are going to be compelled to take a good, long, hard look at that.

I really believe that you will see, in your role, additional emphasis on the problems of drug use in the Federal Government, and I urge you to consider the consequences of extending the *Ignaccio* case into that area. I am not asking for any commitments—I don't think that is proper—but I think you ought to be on notice that I believe we are entering into a new era in regard to drugs in this country as far as Federal employment is concerned, and the *laissez faire* concept of dealing with drug use is over. I would hope that the Board would reflect that opinion. But, again, that is your problem.

Is there anything you are aware of in your background which might present a conflict of interest of the duties of the office to which you have been nominated?

Mr. LEVINSON. No.

Senator STEVENS. Do you know of any reason, personal or otherwise, that would in any way prevent you from fully and honorably discharging the responsibilities of the office to which you have been nominated?

Mr. LEVINSON. No.

Senator STEVENS. If you are confirmed, do you agree without reservation to appear and testify before any duly constituted committee of the Congress?

Mr. LEVINSON. Yes, Mr. Chairman.

Senator STEVENS. Thank you. Again, I congratulate you, and I thank you for being willing to take on this task. It is not an easy one, and I note with pleasure that you have been involved in employment as a Federal employee in the past, which I think is very good. It will be a very good balance in your position as Chairman of the Merit Systems Protection Board.

Gentleman?

Senator GORE. Mr. Levinson, you are currently the general counsel of the Consumer Product Safety Commission, correct?

Mr. LEVINSON. Senator Gore, that is correct.

Senator GORE. Some of us have been quite concerned about the approach being taken at the CPSC, and it is not my purpose to review that here. However, in recent years, the Commission has placed considerable emphasis on voluntary private standards to protect consumers instead of what many of us believe that the law intends, and that is direct standards that are considered by the Commission itself.

Indeed, I notice that you have authored a legal article on the importance of the former approach rather than the latter. Can we expect you to pursue a similar approach at the Merit Systems Protection Board, leaving the discretion in the hands of agency heads and managers on a voluntary basis instead of having enforcement of the standards that you are required by law at the MSPB to enforce?

Mr. LEVINSON. Senator Gore, I don't believe that the issues that I have addressed at the CPSC can really be so easily analogized to what I will face, if confirmed, at the MSPB.

I would note in particular, with respect to the article that I authored on voluntary standards, that it was an article designed to explain to the Washington Bar, in particular, precisely what the 1981 amendments to the Consumer Product Safety Act really entailed and how they were being administered by the Commission, and to simply set forth in narrative form the two or three major deferrals to voluntary standards efforts that had taken place over the last 3 or 4 years.

I would add that I received compliments on the article from members of the Commission who might approach this particular issue from very different perspectives. All Commissioners felt that it was a very balanced presentation.

At the Board, my role really is to be the chief judge of the civil service system and to adjudicate fairly the cases that come before me and to assure that our review of the civil service system, as it is undertaken by the Merit Systems and Review Studies Group, is done in an unbiased, objective, aggressive way, and you have my firm commitment that I will make sure that that is done.

Senator GORE. That is a good solid response, and I certainly appreciate it.

You spent several years practicing with McGuiness & Williams here in Washington. Would you briefly describe the kinds of matters you handled for this firm?

Mr. LEVINSON. Certainly, I would be delighted to. Most of my work at the firm involved appellate practice, both in the area of title VII of the Civil Rights Act and matters under the National Labor Relations Act, the Wagner Act. I spent a considerable portion of my time developing briefs to be submitted before the various courts of appeals and the U.S. Supreme Court on issues of importance to industry generally concerning those two broad topics. I would say that comprised about 70 to 80 percent of my time.

Senator GORE. I notice that one of the other articles you have authored addresses the notion of personal liability of managers and supervisors for corporate equal employment policies and decisions. Would you extend the thesis of that article to the rights and protections of government whistleblowers? In other words, could you conceive, out of private action, asserting liability on the part of someone who punished a whistleblower on the basis of that person's lawful disclosure rather than on the basis of merit?

Mr. LEVINSON. Well, I think the issue does get raised in very different contexts, public service/private sector, and as to the general—what I think you are asking is whether Federal supervisors should be personally liable, perhaps, for the actions taken?

Senator GORE. Yes, that is correct.

LEVINSON. Certainly, with respect to intentional torts, they are personally liable. The Supreme Court has spoken close to these kinds of issues, but I am talking off the top of my head now. To give you a really detailed response, I don't think I am in a position to do that.

Senator GORE. If you want to supplement your response to the record, I think it might be interesting, because you have looked carefully at the law in this particular area, and although there are differences, as you note, between the public and the private managers, it would be interesting to have your views on whether or not it might be a good idea to expand the private right of action for whistleblowers against superiors.

I know that Senator Levin has been a real leader in the movement to protect whistleblowers. Just before deferring to him, how do you perceive the role of the MSPB Office of Special Counsel in whistleblower cases?

Mr. LEVINSON. The Special Counsel's Office, Senator Gore, I would view as the prosecutor that takes the case before the court, being the MSPB in this instance, and the special counsel is really acting to vindicate the integrity of the civil service system to ensure that the system is preserved, that the integrity is uncompromised, and it acts in that institutional role.

Senator GORE. The American people generally have wanted to see Government place a higher value on whistleblowing. I would like you to tell this committee that when you join this Board, you are going to urge a more aggressive protection of whistleblowers by the MSPB. Can you tell us that?

Mr. LEVINSON. Based on what I have read and what I have learned in my couple of years at OPM and now more recently, speaking with the incumbents of the MSPB, my sense is that the Special Counsel's Office is operating rather well.

Now, I think I need to be more involved in the details of that operation to see exactly what kind of cases come before us, come

before me in my role as a judge rather than, in effect, prejudge at this instance whether more or less action is needed in a particular part of the Board's operations.

Senator GORE. Thank you, Mr. Chairman.

Senator STEVENS. Thank you.

Senator LEVIN.

Senator LEVIN. Senator Gore and Senator Stevens both mentioned the whistleblower issue, and I am a little bit taken aback by your comment that based on your conversations with the incumbents and with the Office of Special Counsel you are of the opinion that things are going all right in terms of protecting whistleblowers. Would you expect to hear anything else from them?

Shouldn't you be at least of no opinion until you hear all sides of this issue?

Mr. LEVINSON. Yes. Perhaps I have not communicated clearly in this matter. What I have read and what I have heard suggests that the Office is working well. I, of course, reserve opinion as to whether, upon my taking office and seeing that operation firsthand, I would agree with whatever assessments have been made by the incumbents or their staffs.

Senator LEVIN. Have you read the brilliant indictment which I offered in the Congressional Record of the current whistleblowing system?

Mr. LEVINSON. No, sir, I have not.

Senator LEVIN. Because we have introduced a bill.

Mr. LEVINSON. But I certainly will. [Laughter.]

Senator LEVIN. We have introduced a bill—"we" being Senators Gore, Grassley, Chiles, and a number of others—to improve the protection for whistleblowers. You obviously haven't read the background of that bill or you would be of a different opinion. I know that. We will make sure that you have that available to you to study so that you can look at both sides of this issue. There are a number of us who feel we have not given adequate protection to whistleblowers. We hope you will at least keep an open mind until you see the evidence that we have to support that case.

You should know that a study by the Merit Systems Protection Board showed that the number of Government employees who gave fear of reprisal as the reason for not reporting waste and abuse increased from 20 percent in 1980 to 37 percent in 1983. That is, almost twice as many people reported that as the reason for not reporting waste and abuse in just 3 years.

So we have got a problem of some kind. Maybe it is a perception problem on the part of Federal employees, but there is a problem. We would hope that you would, again, address that problem. Will you keep an open mind as you go about the job of trying to understand why it is that twice as many Federal employees now give fear of reprisal as the reason for not reporting something that society wants them to report?

We are going to count on you to do that.

Mr. LEVINSON. Of course, for 1983, although it isn't that long ago, in terms of the lifetime of the Civil Service Reform Act, it is fairly early in its history. I certainly will welcome the opportunity to work with this committee as we near the end of the first decade of

the act to see whether it is fulfilling all of the promises encompassed in the act.

Senator LEVIN. One of the provisions of the bill that I have referred to is that it would allow Federal employees who allege a prohibited personnel practice has been taken against them in a reprisal for whistleblowing to take their cases directly to the MSPB without necessarily even going through the Office of Special Counsel. Do you have any opinion on that particular provision of the bill?

Mr. LEVINSON. Not at this time.

Senator LEVIN. Are you familiar with the decision of the Supreme Court in the *Mount Healthy School District* case?

Mr. LEVINSON. Yes; I am.

Senator LEVIN. Can you tell us whether or not you believe that the standard in the *Mount Healthy* case has been applied fairly and fully by the MSPB? Do you have an opinion on that?

Mr. LEVINSON. No; at this point, I don't.

Senator LEVIN. Do you agree that that opinion should be fully implemented by the MSPB?

Mr. LEVINSON. I think the Board needs to take a very close look at Mount Healthy and see exactly where it should be applied, if it should be applied in certain areas, and I know that this has been a particularly controversial part of the Board practice.

Senator LEVIN. Do you believe the Board should fully implement the spirit of that opinion?

Mr. LEVINSON. The spirit?

Senator LEVIN. Yes.

Mr. LEVINSON. Certainly.

Senator LEVIN. As well as the letter?

Mr. LEVINSON. Certainly.

Senator LEVIN. Thank you, Mr. Chairman.

Senator STEVENS. Thank you. Again, my thanks to you, Mr. Levinson. In any event, if any member who is not here wishes to submit questions, we will submit them to you.

We are now going to turn to Mr. Frazier, who has been nominated to be a member of the Federal Labor Relations Authority.

TESTIMONY OF HENRY B. FRAZIER III, NOMINEE TO BE A MEMBER OF THE FEDERAL LABOR RELATIONS AUTHORITY

Senator STEVENS. You are already under oath, Mr. Frazier. You have been nominated, as I indicated, to become a member of the Federal Labor Relations Authority. Have you had any relationship with that Authority in the past?

Mr. FRAZIER. Yes, sir. I have served on the authority since its inception in 1979.

Senator STEVENS. How many terms have you been there?

Mr. FRAZIER. The initial terms were staggered terms, and I had a 1-year term as my initial term, and then I had a 5-year term following that.

Senator STEVENS. Your nomination for reappointment has raised some eyebrows here, and we are going to see those eyebrows in a little while and hear from the people who have expressed opposition to your reconfirmation.

The allegation by some Federal unions is that they have been frustrated in dealing with you, and there appears to be a sort of a common thread through their complaints which I think we can summarize by just saying it is a frustration.

You are familiar with them, I presume? How have you responded to their complaints?

Mr. FRAZIER. Yes, sir; and I met with the majority and minority staff members of this committee. They raised certain questions with me and indicated that the unions had complained about certain aspects of the performance of the agency and about my reappointment. I would be happy to respond to any specific criticism that you might wish me to respond to.

In my capacity as a member of the Federal Labor Relations Authority, I am one of the three members or, as of now, one of two members. At times we have had three; at times we have had two. The responsibility of the members is to decide cases that are brought to the Authority. We don't have direct dealings with the unions or the agencies that are parties to the cases. So that in terms of any unhappiness they have with me, I haven't had direct dealings with them to try to resolve any dissatisfaction they might have expressed.

Senator STEVENS. With the exception of time out for active duty training for the Air Force, it is my understanding that you have been in public employment, almost all of which has been with Federal agencies since 1959. Is that right?

Mr. FRAZIER. Yes, sir. I became a Federal employee in 1959.

Senator STEVENS. In one of your responses to the prehearing questions, you indicated that there is an analysis of the FLRA with recommendations that the staff is working on now. Why was that study commenced?

Mr. FRAZIER. The study was commenced in 1984 when Chairman Barbara Mahone was a member of the Authority. The other members at that time were myself and Ron Haughton, and we initiated a general review of our procedures to determine whether we could improve the effectiveness and efficiency in the operations of the agency. We solicited comments from agencies and unions. We solicited comments from our own staffs; suggestions from our own staff.

Soon after we initiated that process, Chairman Mahone resigned to return to employment in the private sector. That left two members, Ron Haughton and myself. Ron's term had expired the preceding July, and the administration was actively working to replace him. They asked me to become the acting chairman at that time in a caretaker role until the new member, in fact, two new members were selected and appointed.

I assumed that responsibility on September 1, 1984, and continued as Acting Chairman until December 15, 1985. The action to recruit and select and nominate new members took longer than they thought it was going to take initially. So my caretaker role lasted longer than was expected.

When I became the Acting Chairman, I concluded that this review of our procedures, which had been initiated, should be suspended for what I thought was going to be a 2- or 3-month period until the new Chairman came on board, and then we could continue the process.

Since Jerry Calhoun has come on board, last December, we have continued the process. Task forces were appointed within the agency to review all of the suggestions that we received from the unions and the agencies and from within the agency itself. We have held a sunshine meeting in which we have solicited public comments on four issues that we felt we needed more information on, we, being the members. We are now reviewing that material as well as subsequent submissions that will come in from the parties. Then I think the members will be in a position to make determinations as to changes in the procedures and practices of the Authority to try to make it more efficient internally as well as more efficient in dealing with the public and in handling our cases.

Senator STEVENS. Will this study recommend changes in the basic law under which you operate?

Mr. FRAZIER. No, sir. I can say as of today, we have not felt that it is within our charter to propose changes to our basic statute. We are essentially an adjudicatory body. We sit as judges, much as the MSPB people do, and we have not viewed it as our responsibility to initiate legislative proposals to change our statute.

Senator STEVENS. Recently, the AFGE brought a suit against the FLRA. I understand it was dismissed by the court of appeals. Are you familiar with that case?

Mr. FRAZIER. One of the mandamus cases? Is that one of the cases you are referring to?

Senator STEVENS. Yes.

Mr. FRAZIER. Yes. Yes. There were several. I am familiar with them.

Senator STEVENS. Were several dismissed by the court of appeals?

Mr. FRAZIER. Some, yes. Most of them have either been dismissed as either moot, or the cases have been dismissed by the district court of the court of appeals as not warranting action at this time because of actions which the Federal Labor Relations Authority has taken in recent years to improve its case processing.

I might go back to the time I became Acting Chairman and Ron Haughton and I were the only two members. Ron and I sat down and talked about what we should do to continue to process cases and make the agency a functioning agency, even though his term had, in effect, expired, and he was continuing to serve under a provision in the statute which called for him to serve until replaced, and even though I was only an acting chairman. We decided to take every initiative that we could to reduce the case backlog that had developed at the agency early on, and I can go into a lot of details as to why that backlog developed, if you like.

Starting in September 1984, Ron and I applied ourselves for the remainder of that calendar year, and then Ron left the agency in December and then William McGinnis came on board. In October of that year, I was pleased to announce that we had closed 750 cases in fiscal year 1984, which was the highest number, by more than 100, that the Authority had ever closed in any year in its history.

We continued in fiscal year 1985 to attack the case backlog. We closed 822 cases in fiscal year 1985, and we reduced the pending caseload to 460 cases at the end of fiscal year 1985, which was the

lowest number that we had had pending since the early months or the first year or so of our operations.

With that elimination of the older case backlog, we have now been able to concentrate on improving our procedures to ensure that cases as they come in are processed as soon as they are ready for processing and moved through the case processing procedures in an orderly and efficient fashion so that we can get our cases closed without as much delay as we have experienced in the past.

This was recognized by the Federal courts here in Washington when they dismissed these petitions for writ of mandamus filed by AFGE, because the courts recognized that we had attacked the backlog problem. We have eliminated, for the most part, the case backlog, as such, and we pretty much have a current inventory on hand that we are processing.

Senator STEVENS. Let's get a little specific. In terms of the *Patco* cases, concerning the strike of air traffic controllers, were you involved in those?

Mr. FRAZIER. I was.

Senator STEVENS. There were allegations that members of the Authority had had ex parte contacts contrary to your own regulations. Were some of those allegations made concerning you?

Mr. FRAZIER. Yes, sir.

Senator STEVENS. What was the situation with regard to those allegations?

Mr. FRAZIER. I will be happy to explain my total involvement in the *Patco* case.

Senator STEVENS. I am not asking for that.

Mr. FRAZIER. All right.

Senator STEVENS. I want to talk about the allegations of ex parte contacts.

Mr. FRAZIER. All right. That is what I will deal with, the ex parte allegations. As a member of the Federal Labor Relations Authority, I was informed by a fellow member of a contact which had been made to him, a communication which he had received concerning the *Patco* case from Mr. Shanker of the American Federation of Teachers.

Senator STEVENS. The contact was not made to you directly?

Mr. FRAZIER. No, sir, that particular contact was not.

Senator STEVENS. I am interested in the contact made with you.

Mr. FRAZIER. All right. I am going to get to those. When I heard about that, I talked with the solicitor of the agency and suggested that he talk with the member about ex parte contact.

I then went to private outside counsel to seek legal advice as to my obligations under Federal law in those particular circumstances, because it appeared from what I had been told that that information went beyond ex parte contact and constituted possible interference with the operations of our independent agency attempt to influence case processing.

As a result of contacting private outside counsel, I was advised that this information should be passed on to the Justice Department. I considered this advice. I agonized over it for several days, almost 2 weeks, and I was concerned about the impact of doing that on our independent agency, on the reputation of our agency,

on the reputation of the members, and I was concerned about the impact it would have ultimately.

I felt I was compelled to follow the legal advice that I received, and I authorized my attorney to go to the Justice Department and report this information. The Justice Department initiated an investigation. The Criminal Division of the Justice Department and the FBI investigated the matter.

Subsequently, the Civil Division of the Justice Department informed the U.S. Court of Appeals of this particular investigation and the court of appeals ordered that the Authority appoint an administrative law judge outside our agency, selected through the offices of the Civil Service Commission, to hold a hearing into all ex parte contacts and other approaches which had been made to members of the Authority.

So it was as a result of my attorney going to the Justice Department that this investigation and then this court order took place.

Senator STEVENS. But I asked you whether any contacts were made to you.

Mr. FRAZIER. Yes, sir. Yes, sir. At the hearing that was held by the administrative law judge, I testified as to two contacts which were made to me, and I would like—

Senator STEVENS. What were those?

Mr. FRAZIER [continuing]. With your permission, to quote from the findings of the administrative law judge.

Senator STEVENS. I am asking you. I don't want you to quote somebody, Mr. Frazier.

Mr. FRAZIER. Yes, sir.

Senator STEVENS. What contacts were made of you on an ex parte basis?

Mr. FRAZIER. Neither of the contacts that were made to me were considered to constitute ex parte.

Senator STEVENS. Mr. Frazier, just tell me what they were, will you?

Mr. FRAZIER. Yes, the contacts made to me were by Mr. Kenneth Blaylock of the American Federation of Government Employees and Mr. Drew Lewis, the Secretary of Transportation at that time.

Senator STEVENS. And when did they take place—subsequent to the resolution of that Shanker contact you told us about, or before?

Mr. FRAZIER. They took place before and after. There were several contacts by Mr. Blaylock. These contacts, I will be happy to describe, but first I would like to say that under the provisions of our rules, our rules prohibit, consistent with the Administrative Procedures Act, any prohibited ex parte communication, and those which are prohibited are those which deal with the merits or the substance of the matter before the members before decision. There are specific exceptions spelled out in our rules as to prohibited ex parte contacts.

Senator STEVENS. Did you tell the people who contacted you about the rules and the fact that that was prohibited?

Mr. FRAZIER. The contacts that were made with me dealt with two of the exceptions to the prohibited ex parte contacts in our rules. One of the exceptions concerns communications pertaining to the status of a case, a case proceeding; another exception pertains

to settlement efforts and proposals for settlement of cases that are before the Authority.

Senator STEVENS. Has there been any finding that any such contacts so far as you are concerned were improper?

Mr. FRAZIER. No, sir.

Senator STEVENS. The FLRA has been criticized for inordinate delays in processing and deciding cases. Are those allegations well founded?

Mr. FRAZIER. As I said earlier, in answer to an earlier question, when the agency was first established, we developed a tremendous initial case backlog, and for the next 2 or 3 years, we were trying to work out of that hole, trying to eliminate that backlog. In fiscal year 1982, we had budget problems, as most agencies did here in town. We had to run a reduction in force. We had to reduce our staff, and that put us further behind the eight ball.

In fiscal year 1984 and 1985, we, the members, initiated a number of changes and efficiencies in our internal case processing procedures, thereby reducing the backlog significantly. As I said, we closed 750 cases in fiscal year 1984, 822 cases in fiscal year 1985, and by the end of fiscal year 1985, we were down to 460 cases, which was as low as we had been since the initial year or so of the operations of the Authority.

Senator STEVENS. I think you would assume, or agree, at least, that there have been some delays.

Mr. FRAZIER. There were delays; I cannot deny that, yes, sir.

Senator STEVENS. And they are based upon the number of cases that were filed with your agency; is that your feeling?

Mr. FRAZIER. The initial problems of trying to get a small agency started, when we inherited the cases that were transferred from the Labor Department and the Federal Labor Relations Council, we had about 1,000 cases filed with the Labor Department that were transferred over, 100 from the Council, then immediately, our statute went into effect. We had to issue new rules; we had to begin processing cases immediately.

In the first 2 years and 9 months of our operation, I think we had 13,500 unfair labor practice charges filed with our agency. We had a tremendous caseload that worked its way up to the members because we were trying to establish the meaning of our statute in a lot of key cases. We were engaged in making some first-time interpretations of our statute. And for all of those reasons, plus the budget and resource reductions in 1982, which hit us terribly hard, we developed a case backlog, and as a result, cases then were not processed as fast as they should have been.

But we have now, I think, eliminated that old case backlog for the most part, and I think we can become current within the next 6 months to 12 months in processing cases through the agency. I think we have made tremendous strides in improving the efficiency of our operations.

Senator STEVENS. I am informed that the FLRA, and, I guess, you participating in that, have changed the interpretation of the statute regarding official time for union negotiators who are involved in bargaining; is that right?

Mr. FRAZIER. Official time? There have been several types of cases and issues pertaining to official time for union negotiators.

Senator STEVENS. Have you reversed the original decision of the FLRA concerning official time for union negotiators involved in bargaining?

Mr. FRAZIER. I'm not sure which initial decision that you are referring to. I would be glad to discuss our cases with you.

Senator STEVENS. Let's put it this way: The original interpretation of the FLRA's statute permitted official time for union negotiators in all bargaining. Have you changed that interpretation?

Mr. FRAZIER. No; there was a case in which we held--first, the statute provides official time for the union negotiators engaged in bargaining a basic contract. We had an issue before us as to whether bargaining supplemental contracts was covered by 7131(a) or 7131(d) of our statute pertaining to official time. We ruled that (d) applied. The court said no, (a) applied, and we have followed that court decision.

Senator STEVENS. It has been a constant interpretation of the FLRA while you have been on it that all time spent by union negotiators in official bargaining is official time, right? Is that what you are telling us?

Mr. FRAZIER. I'm saying that it has been the consistent interpretation of the Authority, since I have been on the Authority, that all bargaining with respect to the basic contract that is negotiated in a bargaining unit is covered by section 7131(a) of our statute, which authorizes official time for union negotiators.

Senator STEVENS. Do you know of any interpretation of the agency since you have been there that has not allowed a union negotiator official time for bargaining?

Mr. FRAZIER. Yes, sir.

Senator STEVENS. What was that?

Mr. FRAZIER. The supplemental contract provision that I just referred to. The Authority held that because there is only an obligation to bargain at the level of recognition, that the official time, the legal authorization under 7131(a), applies to that negotiation and not to the negotiation of supplemental agreements that might be called for in the master agreement. Indeed, we said--and we were reversed by the court--that 7131(d), which provides that the parties may negotiate additional official time for other activities, applied to supplemental agreements which were provided for in the master agreement.

Senator STEVENS. Is the FLRA now complying with the court's decision?

Mr. FRAZIER. Yes, sir. Yes, sir.

Senator STEVENS. Do you follow the practice in the FLRA that the NLRB does in terms of having a general counsel present cases to you?

Mr. FRAZIER. No, sir. The general counsel, in our agency, is an independent prosecutor. He is a Presidential appointee, and he does not present cases personally to us. He represents one side in unfair labor practice cases before the Authority. He is one of the party litigants in unfair labor practice cases at the Authority.

So that his relationship with us is an arm's length relationship, as you might expect between a prosecutor and a judge. He administers the regional offices of the Authority and supervises the staff that investigates unfair labor practice charges; he issues com-

plaints; and he prosecutes those complaints before administrative law judges.

The administrative law judges' decisions are then presented to us for final action, and the general counsel, like any other party, can file exceptions to those decisions, proposed decisions, of the administrative law judge. That is our relationship with the general counsel. It's similar to the relationship at the NLRB.

Senator STEVENS. Since you have been a member of the FLRA, have you been the subject of investigation by any agency, such as the FBI?

Mr. FRAZIER. Yes, sir, for this appointment.

Senator STEVENS. On the one matter concerning the contact problem, right?

Mr. FRAZIER. That, plus a background investigation pertaining to this particular nomination.

Senator STEVENS. Yes, I understand that. You have been subject to a background check each time you have been nominated.

Mr. FRAZIER. Yes, sir.

Senator STEVENS. Other than the problem that you referred to before about—

Mr. FRAZIER. Patco?

Senator STEVENS [continuing]. The Patco situation, has there been an investigation of your activities as a member of the FLRA?

Mr. FRAZIER. Not to my knowledge.

Senator STEVENS. Any other agency? Has your official conduct been the subject of investigation by any official body to your knowledge?

Mr. FRAZIER. The General Accounting Office has been in several times and reviewed matters in our agency.

Senator STEVENS. That is agency. I am talking about your personal involvement now.

Mr. FRAZIER. No, sir.

Senator STEVENS. None?

Mr. FRAZIER. No, sir.

Senator STEVENS. Prior to coming here now, since you have been involved in Government service, have you been involved in any civil matter or criminal matter in the courts?

Mr. FRAZIER. There was an automobile accident which led to a civil suit back in 1958 or 1959 which led to nothing.

Senator STEVENS. It didn't involve any improper conduct such as driving under the influence or anything like that?

Mr. FRAZIER. No, sir, absolutely not.

Senator STEVENS. Do you know of anything in your background that might present a conflict of interest with the duties of the office to which you have been nominated?

Mr. FRAZIER. No, sir.

Senator STEVENS. Do you know of any reason, personal or otherwise, that would in any way prevent you from fully and honorably discharging the responsibilities of the office to which you have been nominated?

Mr. FRAZIER. No, sir.

Senator STEVENS. If you are confirmed, do you agree without reservation to appear and testify before any duly constituted committee of Congress?

Mr. FRAZIER. Yes, sir.

Senator STEVENS. Do you know of anything in your background that would in any way lead to an embarrassment of the agency if you are reconfirmed?

Mr. FRAZIER. No, sir. My life is an open book.

Senator STEVENS. Thank you very much.

Mr. FRAZIER. Yes, sir.

Senator STEVENS. Senator?

Senator EAGLETON. Thank you, Mr. Chairman. Just a few background things, Mr. Frazier, and then we will get into the substantive matters. Senator Stevens has covered the area, I think, extraordinarily well. You graduated Phi Beta Kappa from the University of Virginia in 1956?

Mr. FRAZIER. Yes, sir.

Senator EAGLETON. Then graduated Order of the Coif from George Washington University Law School in 1967?

Mr. FRAZIER. Yes, sir.

Senator EAGLETON. What did you do between 1956 and law school?

Mr. FRAZIER. I was working and I went to law school at night.

Senator EAGLETON. Where did you work?

Mr. FRAZIER. I worked for the Department of the Army.

Senator EAGLETON. I see. So you have been a career government employee virtually since the time you graduated from Virginia?

Mr. FRAZIER. Except for some time in the service, yes, sir. I came to work for the Government in 1959.

Senator EAGLETON. And you have been a career employee at the FLRA or whatever it was previously called, since when?

Mr. FRAZIER. I went to work at the Federal Labor Relations Council in 1970, and the Council was replaced by the Federal Labor Relations Authority in 1979.

Senator EAGLETON. So you have been at this kind of work 16 years?

Mr. FRAZIER. Yes, sir.

Senator EAGLETON. The colleagues that have joined you from time to time on the FLRA, they have not had previous experience in FLRA matters specifically, have they? They have been "from the outside"?

Mr. FRAZIER. Yes, sir. They have been from outside of the agency.

Senator EAGLETON. Outside of the agency. They might have had some work in labor matters of whatever.

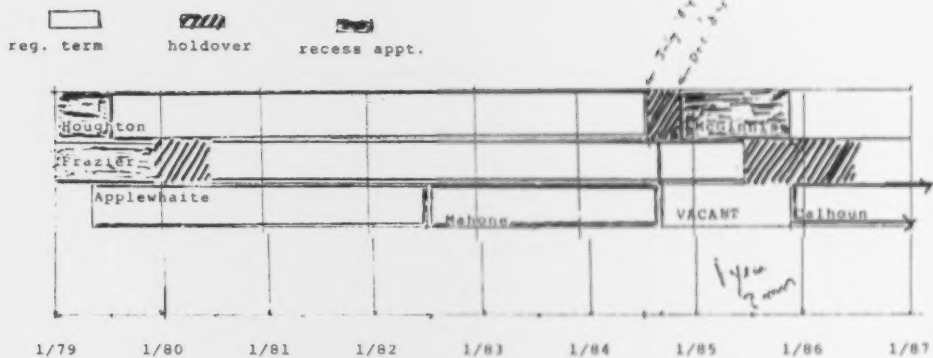
Mr. FRAZIER. Or government.

Senator EAGLETON. Or government. My staff has made a chart that I think is rather interesting. I will ask that the chart be placed in the record. This is a three-person Board; they are Commissioners; is that right?

Mr. FRAZIER. Yes, sir.

Senator EAGLETON. If you look at the chart, there have been many months when the Authority was either operating with an unconfirmed member or two, or an acting chairman, that has been you, or, indeed, for a long time with a vacancy.

[The chart referred to follows:]



Mr. FRAZIER. That's correct.

Senator EAGLETON. What impact has that condition that I have just described had on the functioning of the FLRA?

Mr. FRAZIER. I would say that the most significant impact is that when you have only two people, you can't decide a case unless they both agree. During the period calendar year 1985, when I was the acting chairman and we had one other member who was a recess appointee and the vacancy, there were a number of cases that were held in abeyance because we did not agree on the outcome, because as acting chairman, I simply felt we had to wait for the third member to resolve major policy issues facing us.

So when the GAO came in and studied our operations at that time, I think they found that 127 cases, or about 25 percent of our caseload at that time, was being held up for that reason.

Senator EAGLETON. Twenty-five percent of your caseload was being held up for that reason. According to my chart, when Ms. Mahone resigned, it looks like she resigned in mid-1983.

Mr. FRAZIER. I think she left at the end of August 1984. I may be wrong.

Senator EAGLETON. If she left in August 1984, let's go by your memory. The chart, then, may be in error. When did Mr. Calhoun come on? Mr. Calhoun was the ultimate replacement, right?

Mr. FRAZIER. Yes, sir. He came on board December 15, 1985, this past December.

Senator EAGLETON. The chart is correct on that. So according to your recollection, then, there was an open seat for 1 year and about 4 or 5 months.

Mr. FRAZIER. Yes, sir. I was the acting chairman for 15½ months, and—

Senator EAGLETON. You were acting chairman, but you could vote on cases.

Mr. FRAZIER. During that vacancy, during that entire period.

Senator EAGLETON. I am talking about the seat Mr. Applewhite used to have and Ms. Mahone used to have; there is a big vacancy period.

Mr. FRAZIER. Yes, sir.

Senator EAGLETON. According to your memory, that 1 year and 5 months, August 1984 to December 1985, is that when these 100 and some odd cases began to build up? When I guess you and Mr.

Haughton, and then there was another gap and then Mr. McGinnis came on—he wasn't on long—and then another gap. Who was with you during that time? [Laughter.]

Mr. FRAZIER. Mr. Haughton was there, Ron Haughton was there from the time I became acting chairman on September 1, 1984, until the end of that year, which would have been December, late December 1984. Then Mr. McGinnis received a recess appointment at that time, and he was on board from December 1984 until December 1985 as a recess appointee.

Senator EAGLETON. So in fact, over a span of time, from August 1984 to December 1985, that is a pretty long time, 1 year and 5 months, you were there.

Mr. FRAZIER. Yes, sir.

Senator EAGLETON. Haughton was there some of that time.

Mr. FRAZIER. Yes, sir.

Senator EAGLETON. He was even gone a few months; McGuinnis was there as recess appointee; and the other seat was vacant a large period of that time.

Mr. FRAZIER. Yes, sir.

Senator EAGLETON. This is no fault of yours. You can't run a board or an agency under those conditions.

Mr. FRAZIER. I would concur 100 percent.

Senator EAGLETON. You just can't have a seat vacant for 1 year and 5 months on a three-member board. The other two members may split, and the other member sits with you under recess appointment, and therefore, by the very nature of that appointment, it is not certain that he or she is going to remain there all that long when you are under a recess appointment.

Mr. FRAZIER. That's correct.

Senator EAGLETON. It is just a turbulent atmosphere. Senator Stevens asked you about this Patco matter, and I won't replot that ground, but you were about to read some findings from the ALJ at one point.

Mr. FRAZIER. Yes, sir.

Senator EAGLETON. Is that a published document?

Mr. FRAZIER. Yes, sir. I will be happy to submit it for the record.

Senator EAGLETON. Is there a highlight sentence or two that you care to read out loud, or three or four?

Mr. FRAZIER. Yes, sir, just two or three; I would very much appreciate it.

Senator EAGLETON. Read a limited number. We will put the whole document, at least those pages that are pertinent thereto, in the record.

Mr. FRAZIER. Thank you, sir. I would like to read this statement. The ALJ said, and I quote:

On the whole, I have found Mr. Frazier's and Mr. Haughton's testimony to be credible. On the other hand, Mr. Applewaithe's testimony, in substantial parts was confusing, contradictory and in some respects incredible.

Senator EAGLETON. All right, Applewaithe was another commissioner, right?

Mr. FRAZIER. Yes, sir. Yes, sir.

Senator EAGLETON. OK.

Mr. FRAZIER. The ALJ also said, and I quote, that he believed my actions "—were based on an honest concern for the decisionmaking process at the FLRA," and that he also found, with respect to the two contracts that I described in connection with Senator Stevens' question, that, "Mr. Blaylock's conversations with Member Frazier had no effect on Member Frazier's decision in the Patco case."

He found the same thing with respect to the Secretary of Transportation's contract, that it had no effect on my decision on the merits of the unfair labor practice case filed against Patco. But I would be more than pleased to submit the entire case for the record.⁴

Senator EAGLETON. OK. I don't want a 100-page document in the record, but submit for the record such portions thereof as bear on the question of Senator Stevens and myself. I ask unanimous consent that such documents be placed in the record. I ask unanimous consent that the chart, to which I made previous reference be placed in the record.⁵

Senator STEVENS. No objection.

Senator EAGLETON. Maybe I have one or two questions more.

There was criticism about the procurement of furniture at the FLRA. From whom did that criticism come, and what about it?

Mr. FRAZIER. The criticism came from, initially from this committee, and then this committee asked GAO to investigate.

Senator EAGLETON. You were on the cabinets and furniture committee weren't you, cabinets and furniture? You got caught up in that and were caught for furniture.

Mr. FRAZIER. I can give you a very long and extensive answer to the question, but I will try to summarize.

Senator EAGLETON. How about short and cogent? [Laughter.]

Mr. FRAZIER. All right, short and cogent. There were two furniture procurements at the FLRA that I was involved in. One was before the agency came into being, and that was done through the Civil Service Commission and GSA. No question ever came up about that procurement. It was the initial procurement of the furniture for the members of the Authority before the Authority came into being and before the members were appointed.

I was at the old agency, and I was asked by Scotty Campbell, who was my boss, to start all the plans and get it rolling for the new people, and I did that. That was the initial procurement. Subsequently, there was to be a supplemental procurement once GSA found office space for us.

GSA took quite awhile to find office space. We finally found it; floor plans were approved; additional furniture was procured; the supplemental procurement which was envisioned earlier. The problems that came up with respect to that procurement were fourfold: First, the furniture was criticized as being too expensive, and then after GAO investigated the matter for this committee, the GAO found that three regulatory requirements that had to be met pertaining to procurement of this furniture and the transfer of the funds that were made from our agency to GSA for the procurement of the furniture were not done properly.

⁴ See p. 201.

⁵ See p. 26.

At the time those technical actions were taken, the members of the Authority, as we have all three said in writing to this committee and in testimony before the committee and to the GAO, we thought what was being done, the technical things, were accurate and being done properly.

We discovered, after GAO studied them, that they weren't in accordance with the regulations, that, for example, the reimbursable work order which had transferred \$860,900 from our agency to GSA for renovation of office space for layout, for procurement of furniture and equipment, didn't actually transfer the money, so that at the end of that particular fiscal year, apparently the appropriation lapsed rather than being available for use.

In subsequent fiscal years, after we got the office space, the money was used, and then it was discovered, we shouldn't have used it, so we had to charge it off against money in other years.

Senator EAGLETON. Let me ask this, Mr. Frazier.

Mr. FRAZIER. Yes, sir.

Senator EAGLETON. There was no allegation that anybody put some money in your pocket?

Mr. FRAZIER. Absolutely not; no, sir.

Senator EAGLETON. So let's pass this business about the book-keeping. Was the gravamen of the charge or the allegation that our agency spent too much money on elaborate furniture? Is that the guts of the situation?

Mr. FRAZIER. Yes, sir. That was a charge that came from this committee, yes, sir.

Senator EAGLETON. What did the GAO find? Did they find that that was the case?

Mr. FRAZIER. The GAO added up the value of the furniture. The committee had already held hearings and concluded that it was too expensive, but GAO looked at the technical points that I was referring to and found that we had corrected those and said that no further action was directed.

Senator EAGLETON. Who bought the furniture? Who ordered the furniture?

Mr. FRAZIER. The furniture was ordered, technically was ordered, by the procurement officer of the agency.

Senator EAGLETON. Did you approve it?

Mr. FRAZIER. I approved the furniture that was selected, and I might say that the furniture that was selected was of the same quality, in some cases, the same manufacturer as the initial furniture procurement which I described, about which no question had ever been raised. Apparently, it turns out that the furniture that was purchased on the initial procurement was considered appropriate, but then at the time the second procurement took place, that furniture was no longer appropriate. It was considered too expensive.

Senator EAGLETON. Too expensive?

Mr. FRAZIER. Yes, sir.

Senator EAGLETON. Did the GAO conclude in their respect by what measure it was too expensive? Were you \$100,000 more than you should have had, \$200,000, \$1 million? I don't know.

Mr. FRAZIER. No, sir; they didn't draw any conclusions. To the best of my recollection, they never reported in that regard. They

simply said that of all of the furniture that was procured for the three members plus wall coverings, carpeting, renovation, including some things, those things, the wall coverings and carpeting for the general counsel, plus some things for other employees of the agency, the total cost was about \$250,000, as I recall, and the conclusion was that this furniture, the total procurement was too expensive.

Senator EAGLETON. My final question: It has been commented upon that the FLRA has what is called a unitary staff. We know, of course, that the FLRB allows each member to have his or her own staff, which some argue allows for more independence of the members of the FLRB in formulating their judgments. Why does the FLRA have a unitary staff?

Mr. FRAZIER. Senator, I would like to say first that the membership of the FLRA has examined this issue on several separate occasions. We have testified about it before our oversight subcommittee in the House, and we have got some specific testimony that I would be happy to enter into the record here today on that.

But I would say that initially, when the agency came into being, the members concluded that because we had a very small staff numerically and because we were forced to process several distinctly different types of cases in which we had separate staff expertise, that if we tried to divide that small staff up to take each expert group and divide them among the members, we really wouldn't have enough working expertise to go around. We concluded then that the most efficient and effective manner of processing the unfair labor practice, negotiability, representation and arbitration cases that we process was to have a single unitary staff that was equally responsive to each member.⁶

Since Jerry Calhoun came on board as Chairman, we have reviewed this issue once again, and he has concurred in the decision that based on efficiency and economy, the most effective way of getting cases out of our agency is to retain a unitary staff.

Senator EAGLETON. Have you made a study or has anybody made a study of three-member boards or agencies? FLRB, how many do they have?

Mr. FRAZIER. Five.

Senator EAGLETON. ICC has even more, and so forth. Has anybody made a study of three-member agencies to determine how many of them are unitary and how many of them are, shall we call it, individual?

Mr. FRAZIER. Our staff has looked into it, and I don't have that information readily at hand, but I believe that the consensus, as I recall what staff said, that NLRB is one of few agencies that has distinctly separate staffs and the most adjudicatory or investigatory agencies have unitary staffs to a great extent.

Each member of our agency has a small staff.

Senator EAGLETON. What is your staff, a secretary, of course, and what else?

Mr. FRAZIER. I have a legal adviser, an executive assistant, a legal adviser, a grade 15 level position. It is a senior level legal ad-

⁶ See p. 198.

viser, and then I have detailed to my office at the present time a midlevel attorney to assist the legal adviser in processing cases, and that is the extent of my personal staff.

Other members have had staffs comparable to that, in some cases, one or two more. I should note that the National Labor Relations Act, in effect, makes provision for separate staffs for the members because attorneys can only be hired by the members to work on the separate staffs under a provision of the National Labor Relations Act.

We don't have such a provision set forth in our law.

Senator EAGLETON. That is set forth under the law?

Mr. FRAZIER. Yes, sir.

Senator EAGLETON. Thank you, Mr. Chairman.

Senator STEVENS. Senator Gore?

Senator GORE. Thank you very much, Mr. Chairman.

Mr. Frazier, I would like to welcome you to the committee, but I have to tell you quite candidly that I am quite concerned about your renomination to serve another term. Senator Stevens has explored with you the question of the lengthy delays that have taken place while you have been a member of the FLRA.

In response to a question by Senator Stevens, you mentioned that the outcomes of some backlogged or delayed cases were dismissals. Although I think that is probably correct in some cases, I don't think that at all explains away the fact that the courts have referred on numerous occasions to what they call the sad history of your decisionmaking process at the FLRA, a history of unjustifiable delay. They have described it as intolerable, and they have criticized it on those grounds on many occasions.

Surely, the courts are aware of any kind of backlog and yet they persist in describing the timeliness of your decisionmaking over there in these terms. How do you explain that?

Mr. FRAZIER. Senator, I would first like to point out that in recent decisions, by the D.C. circuit and by the district court here in the District of Columbia, they have recognized that we have attacked the delay problem and that we have acted on our backlog and that we have issued more decisions in the last 2 years than we have issued at any time in our history.

We have gotten our workload down to the point where we are timely processing cases. So that the court of appeals—

Senator GORE. Wait just a second. When did your history begin? When was the FLRA—

Mr. FRAZIER. The FLRA was established in 1979.

Senator GORE. So if you have done more than at any time in your history, that is not really saying a lot, is it?

Mr. FRAZIER. No, sir; but I would like to say we did this in circumstances, described by Senator Eagleton, where at times we had only two members, one at a time whose term had expired, or a recess appointee and I was acting chairman.

For example, in fiscal year 1985, we issued 822 decisions, which was the largest number we had ever issued. The preceding year we closed 750, which was 100 more than we had ever issued in any year before, so that in fiscal year 1984 and fiscal year 1985, we attacked the backlog problem; we have reduced the case backlog to a manageable number now.

This has been acknowledged by both the courts. It has been recognized by GAO in their most recent reports on our operation. We have the petitions which were sought by the American Federation of Government Employees for writs of mandamus to order us to speed up our process dismissed by the courts because they acknowledged that we have taken these actions and turned the corner in case processing.

Senator GORE. Well, it took quite a few years for you to address this problem. When you look at the people who are affected by these delays, it seems to me a very bad record. I am glad that the court seems to think you are making a little bit of progress on it, but I don't think the record is a good one.

In a 1983 decision, the Federal court concluded that there was an obligation to bargain on a union proposal if it were an appropriate arrangement for employees affected by an agency's action. I understand that it took the FLRA over 2 years to bring its own decisions into line with the court's holding. Why would that be?

Mr. FRAZIER. I believe you are referring to the excessive interference test which the D.C. circuit handed down and which we have recently adopted.

Senator GORE. Yes; yes, recently adopted 2 years after the holding by the court. Have I got my facts right?

Mr. FRAZIER. I don't recall the date of the court holding, Senator, but I will be happy to explain it.

Senator GORE. It was in 1983.

Mr. FRAZIER. Those particular cases were some of those that the GAO reported were involved in the in abeyance area, the 127 cases that I was describing to Senator Eagleton. And those were some of the cases on board, and he and I reached agreement—two votes were cast in favor of it and we issued the decision. But it relates to the problem of having only two members on board, and if you have two members, you obviously have got to reach total agreement before both can sign and get a decision out.

If you have three members, it is a lot easier, because whoever doesn't want to go along in part or whole can dissent.

Senator GORE. Which one of you refused to accept the holding of the court?

Mr. FRAZIER. I just signed the decision in which we accepted the court holding.

Senator GORE. I am talking about for the 2 years after the court's holding?

Mr. FRAZIER. I wouldn't say that.

Senator GORE. You said there were two members and you have to have an agreement. The implementation is that one of you refused to accept the court's holding.

Mr. FRAZIER. It wasn't a refusal, Senator. We have a similar issue with respect to appropriate arrangements decided in another circuit. In effect, the guidance that we got from that court of appeals in our opinion, in the opinion of our attorneys, didn't comport completely with what the court of appeals here in the District of Columbia had said in its decision on excessive interference.

Senator GORE. Which other circuit was in conflict?

Mr. FRAZIER. I believe it was the ninth, but I will have to check.

Senator GORE. Would you be able to provide that?

Mr. FRAZIER. Yes; may I go on to explain? ⁷

Senator GORE. Your explanation for this delay was that there was a conflict between the circuits on this legal point?

Mr. FRAZIER. No; I would like to explain in a little more detail. The other, the decision of the other circuit cited favorably the excessive interference test but then went on to apply, in effect, another test which we had been applying previously and reversed our decision and found that something that we had held to be negotiable as an appropriate arrangement was not an appropriate arrangement after all and was nonnegotiable.

We felt that if we applied the excessive interference test to that particular case, we would have found it to be an appropriate arrangement clearly, because even under the more restricted test which we have been applying to date, we had found that particular proposal to be an appropriate arrangement.

Senator GORE. I will look forward to receiving more information on that, because it sounds a little tortured to me, with all due respect. It sounds like you had two members and you simply failed to establish procedures for dealing with a caseload that you have. With specific regard to this holding by the court, you just put off for 2 years the process of bringing your decisions into line with it.

I will look forward to seeing your evidence on this conflict between the circuits.

Mr. FRAZIER. Yes, sir.

Senator GORE. However you want to describe it.

Senator STEVENS. Senator, could you yield just a moment?

Senator GORE. Yes.

Senator STEVENS. I have a problem, and the problem is the timing of some other appointments that I have made. I would like to announce for the record that we will continue the hearing, as far as Jean McKee is concerned, tomorrow morning at 9:30 in this room, if that meets with everyone's approval. Further, I don't know how long the Senator wants to take.

Senator GORE. I anticipate about 5 or 6 minutes, if the responses will be brief.

Senator STEVENS. I want to inquire of Mr. Blaylock and Mr. Tobias if you would like to continue tomorrow right after the McKee matter about, say, 9:45 rather than continue through the lunch hour here now? Would that be agreeable with everyone? We can continue the whole hearing and we will take care of Ms. McKee's confirmation and then continue with the testimony concerning this.

Senator EAGLETON. All of that is all right, except why don't you do what you have to do except we will finish with Mr. Frazier, and we will not be intimidating.

Senator STEVENS. I want to suggest that, but first I want to make sure Mr. Blaylock and Mr. Tobias agree. Otherwise, I will come back at 12 o'clock and finish this matter for Mr. Blaylock and Mr. Tobias, if they would rather not do it tomorrow morning at 9:45, which I think would be more convenient to the committee.

Mr. BLAYLOCK. That is fine.

⁷ See p. 211.

Senator GORE. Are you familiar with the Society of Federal Labor Relations Professionals?

Mr. FRAZIER. Yes, sir; I am a member.

Senator GORE. What do you think of that organization?

Mr. FRAZIER. It is an organization that permits labor, management, and neutrals to get together in an informal setting and exchange views and get to know one another to discuss issues pertaining to labor-management.

Senator GORE. Pretty good group?

Mr. FRAZIER. Well, it is a—

Senator GORE. Well-respected group?

Mr. FRAZIER. In the profession of Federal labor-management relations, yes, sir.

Senator GORE. Isn't it true that they just recently completed a survey of their membership and found that your decisions on the FLRA were inconsistent, poorly written, untimely, and lacking in reasonable remedies for violations of laws?

Mr. FRAZIER. The Society of Federal Labor Relations Professionals conducted a by-mail survey of its membership. I think 19 percent of its members responded; 81 percent didn't see fit to respond. They responded to a number of questions which I would describe as—

Senator GORE. That is not unusual for a mail survey, is it?

Mr. FRAZIER. I don't know, sir; I am not an expert in that. I would describe it as a feeling or belief survey. When the results were issued, that organization indicated that the board, during the latter part of 1985, and I am quoting from what they published, the board of directors:

To 665 members the questionnaire was sent out below. As of February 19, 1986, 122 responses were received, approximately 19 percent. Of these 51 were from management representatives, 36 from labor, 26 from neutrals, and 9 did not state affiliation. The board will consider the implications, the degree and implementation of the responses and following the June board meeting will formally report its views. In the interim, the board is to provide the raw data to the members for their information.

I haven't received the results of their June board meeting yet, so I don't know what conclusions they have drawn from the survey.

Senator GORE. Was I correct in describing the findings, that your decisions were inconsistent, poorly written, untimely, and lacking in reasonable remedies for violations of law?

Mr. FRAZIER. I have a copy of the raw data here.

Senator GORE. Is that basically right?

Mr. FRAZIER. I don't know that it is.

Senator GORE. Have you seen them?

Mr. FRAZIER. I have seen the raw data.

Senator GORE. It looks like you would remember something like that.

Mr. FRAZIER. Senator, there were a number of questions, 20 or 25 questions, each of which were coded by—you had answers A, B, C, D, and then the codes across the top showing how many answered A, B, C, and D are broken down by management, labor, and neutrals.

So we have a sort of a grid on each answer to each question, and to draw some general conclusion from that as you read it, I just can't do that.

Senator GORE. Was the survey generally laudatory about your performance?

Mr. FRAZIER. There was a difference of among those who answered, yes.

Senator GORE. Was that result generally negative or positive?

Mr. FRAZIER. More negative than positive.

Senator GORE. Did it include the kind of criticisms that I mentioned here?

Mr. FRAZIER. Some of the questions dealt with clarity and speed timeliness, yes, sir.

Senator GORE. And effectiveness?

Mr. FRAZIER. It may have, I'm not sure. That's possible.

Senator GORE. It seems to me that if you get a survey of the membership of this highly respected organization that has people from management, labor, and the neutral community, and it comes back overwhelmingly negative, giving you very, very poor reviews for your decisionmaking process over there, that that is something that would stick in your memory. I also think that you would be able to characterize it without just resorting to—I won't use that phrase—but a lot of details about A, B, C, D, and color codes and all this stuff.

Is my characterization of their findings generally accurate or not?

Mr. FRAZIER. Overwhelmingly negative, I would say not. I would say also that as the board itself indicated, it was releasing the raw data, but it had not drawn any conclusions at that time, and they decided to develop conclusions in June, and they may have concluded it was overwhelmingly negative by now. I have not seen those conclusions.

Senator GORE. My information is that they rated your performance as ineffective and unsuccessful in improving the Federal Labor-Management Program.

Mr. FRAZIER. I would be happy to submit the questions and answers for the record, if you would like.

Senator GORE. I think we ought to include the survey in the record, and I will ask unanimous consent, when the chairman can rule on that, to put that in the record.^a

Mr. FRAZIER. May I respond to some aspects of the criticism?

Senator GORE. Surely.

Mr. FRAZIER. I think I responded previously to our efforts to speed up case processing and the efforts that have been successful, I think, in reducing the pending case backlog and in improving the case processing. We have also taken measures to improve the clarity of our decision writing. As you might imagine, the members don't draft the decisions. We have a staff, the staff that we referred to earlier, that drafts the decisions for us.

^a See p. 56.

We have recently had someone in who is a trained professional in effective writing, conducting an effective writing course for the staff.

We have a change in the format of the decisions since Chairman Calhoun came on board to try to break the decisions up into units to make the decision more easily comprehended, especially by those who are not trained labor lawyers. We are trying to write a decision so that any audience to which we might direct decisions, such as the labor practitioner in the bargaining unit, the shop steward or the local president or the labor-management relations specialist at the installation level, hopefully, they will be able to understand our decisions, just as will the member of the labor bar who practices before us all the time.

We are working on those things now, trying to improve the clarity of our decisions. We have got a lot of initiatives underway to try to improve the decisionmaking process that the unions see.

Senator GORE. It is one thing to come before the committee and say, "Our performance may have been poor before, but we are improving now." It is another thing, however, to have a survey just in the last few months of the most respected professional society reviewing the results of your efforts to improve it and have them respond in the fashion that they have, describing and rating your performance as ineffective and unsuccessful in improving the Federal Labor-Management Program.

I think that is a very troubling indictment of your performance, and since it is a renomination, I believe we ought to evaluate what you have done while you have been on the Board. It just looks like it is a big mess to me.

Let me go into some other examples here. Under the law as interpreted by the FLRA, a union does not have the right to initiate bargaining during the term of a collective-bargaining agreement. Right?

Mr. FRAZIER. That case is now before the court of appeals, two courts of appeals, I think.

Senator GORE. The part of the statute on which your decision ultimately was based has not been amended since the CSRA was enacted. My question is, why would it take 7 years for you to resolve this issue? How do you weigh the effects of this lack of decisive action over a 7-year period on the mandate that you have in the FLR statute that you shall provide leadership in establishing guidance relating to matters under the statute?

It just seems to me that a failure over a 7-year period to dispose of this particular matter encourages litigation between unions and agencies on the question of what the law means.

Mr. FRAZIER. Senator, we have taken the approach since the inception of the agency to resolve issues as they come before us in the context of specific cases. And we have not attempted to identify on our own, *sva sponte*, if you will, a particular issue and decide it.

Senator GORE. If I may interject at this point, am I wrong in quoting the statute as requiring you to "provide leadership in establishing guidance relating to matters under the statute"? Is that correct?

Mr. FRAZIER. That is correct.

Senator GORE. Is that meaningful?

Mr. FRAZIER. No, sir.

Senator GORE. Does that always have to await the right case or controversy?

Mr. FRAZIER. No, it does not always have. We could engage in substantive rulemaking, but it has been the policy of the agency for the most part not to engage in that sort of thing.

Senator GORE. Has your policy then been in conflict of your statute?

Mr. FRAZIER. I don't think so, sir, because we have provided the leadership through the decisions we have issued, which we have explicated and described the meaning of our statute, and we have applied it to specific circumstances.

Senator GORE. So your policy has been to await a case or controversy and not provide leadership until there is a right case or controversy with specific facts.

Mr. FRAZIER. As I described our situation earlier, we had so many issues that were raised in the context of cases early on that we had little time to do anything else but answer issues in the context of cases and provide our leadership and guidance in that way.

Senator GORE. You would have a hell of a lot fewer cases if you provided leadership of a kind that didn't encourage the bringing of cases. I mean, by failing for 7 years to resolve a matter this basic, by failing to live up to your statute and provide leadership, you encourage more cases, as if you are on a treadmill, encouraging more cases by failing to provide the leadership called for in the statute. That is the way I see it.

Mr. FRAZIER. Well, I would say that we have found that in those instances where we issue a policy pronouncement as to the meaning of the statute, either in a case or, on rare occasions in a policy issuance, it simply leads to more cases.

The theory is nice that if you issue some broad, general guidance, we will avoid litigation. But in practice, it seems to lead to more issues and more questions. I know that the early people at the National Labor Relations Board used to say they always expected to work themselves out of business in the first 5 or 10 years of their operation because they would answer all the big questions. The parties would have all the guidance they needed, and they would know what to do from there. But as we know, the cases have gone up in the private sector at the NLRB.

It is the function of the litigious atmosphere that exists under a statute where you have adversaries engaged before an adjudicatory agency. It would be nice if we could find a way, and we encourage voluntary settlement of cases. We discourage litigation every opportunity we have.

We encourage the parties to try to settle things themselves with our assistance, with the assistance of our agency to try to encourage voluntary settlements. We are not trying to encourage litigation.

Senator GORE. It is kind of hard to encourage a settlement if you refuse to give any leadership or guidance on the meaning of a basic legal question of this kind and just to encourage them to settle while refusing to provide guidance on what the basic legal rights of each party are. I mean, that is not leadership and not good performance in my view.

But on this narrow question of whether a union or only agencies have the right to initiate bargaining during the life of a contract, as I read the record, the FLRA decided one way in 1982 and then the opposite way in 1985. How do you explain that about-face?

Mr. FRAZIER. I'm not familiar with the particular case you are referring to, but I would be glad to talk about the issue generally.

Senator GORE. I am referring that you, in your personal opinion on this case, decided one way in 1982 and then decided the directly opposite way in 1985. You did not provide an explanation of your reasoning in either case. I am interested in how that inconsistency came about. If you don't remember it, that is it. You don't remember that?

Mr. FRAZIER. I don't remember the cases you are referring to. First, I say we never issued decisions without giving reasons for them.

Senator GORE. What about dissents.

Mr. FRAZIER. Dissents also contains reasons.

Senator GORE. You issued an opinion with your dissent?

Mr. FRAZIER. Yes, sir. We had only 10 dissents the entire history of the agency, so let me clarify that. But when the Authority has issued decisions, 99.9 percent of our decisions have either been approved by two members or by three. So while I realize I am the only one here before you today, I would like to point out that these are decisions of an agency. They're not my personal decisions. I have full responsibility for 50 percent of those that I have signed where we have only two members; 33 percent, 33 1/3 where we have had three.

But I am not familiar with those decisions to which you refer.

Senator GORE. Let me refresh your memory. The 1982 case was an unfair labor practice case involving the Library of Congress, and the 1985 matter was an unfair labor practice case brought by NTEU. Does that help you at all?

Mr. FRAZIER. No, sir.

Senator GORE. Supplement your responses for the record, then.⁹ I read the record as showing a historic inconsistency on that legal question. My major concerns have to do with the performance of the FLRA generally, and your role at the FLRA; the timeliness of decisions; the quality of the work done there; and the review by these professionals about how you react to cases. They take a long time, the courts' review, the professional review, et cetera.

I will conclude by reiterating the fact, as you have probably guessed from my tone here, that I am just very concerned about your nomination. I don't want to belabor the point. However, I hope I have made my point that I am very concerned about what you are doing over there.

Mr. FRAZIER. As I said, Senator, during the time that I was the acting chairman and had a greater responsibility than as a member, I saw it as my first responsibility to attack the problem of the delays in case processing and to continue to work on that case backlog, which I think we did and did effectively under the circumstances where we had only two members, where one was a recess

⁹See p. 207.

appointee, where I was the acting chairman, and where there were 127 cases that were held in abeyance for one reason or another. We reduced our backlog down to 460 cases. We made a big push.

We are trying to become current in our case processing. I think we have reached the point where we will be able to process cases through the agency in a timely fashion. I can only say that we have been trying and we will continue to try.

Senator GORE. I would feel more reassured about your self assessment if the professionals in the field didn't disagree with it or didn't appear to disagree strongly with it.

Thank you, Mr. Chairman.

Senator EAGLETON [presiding]. Thank you, Senator.

Senator Gore's questioning was excellent, but Mr. Frazier, something doesn't quite fit. You said there have only been 10 dissents in the history of the agency, yet there are 127 cases you just referred to again, in abeyance, while there are two members on the board.

That would indicate to me that whenever the third member comes on board that there are going to be 127 dissents however the new member votes.

Mr. FRAZIER. No, sir, no, sir. First, when I said 10 dissents, I am referring to issued decisions in a case.

Senator EAGLETON. OK. If 127 cases are held in abeyance, I am presuming that there is a split between you and Mr. Calhoun.

Mr. FRAZIER. No, sir. Excuse me. Those were held in abeyance prior to Mr. Calhoun's coming on board. We have begun to process a great number of those cases now. He and I have reached agreement on such matters as the excessive interference test, which was described and discussed earlier.

Senator EAGLETON. Is this 127 the oldest, mustiest group of cases hanging around?

Mr. FRAZIER. No. It was a group of cases that were in abeyance from when Chairman Calhoun came on board, a number of them were very old, but we have had some other old cases that simply hadn't gotten to the members. We are now attacking the oldest cases, and we are attacking those that the former member and I found, for one reason or another, we couldn't decide and get out of the agency.

Chairman Calhoun and I are now looking at those cases, and we have begun to reach agreement on a large number of them and have issued decisions. So the 127 is a much smaller number today than it was then.

Senator EAGLETON. Senator Gore inquired into the survey, or whatever it is called, of the Society of Federal Labor Relations Professionals. Did you say that some other document has been developed this June? You referred to something else.

Mr. FRAZIER. The document I saw that provided the raw data indicated they were going to have a board meeting in June and formally report its views.

Senator EAGLETON. Could I ask the staff, then, today, to contact the Society of Federal Labor Relations Professionals and get a copy or copies of whatever it is that they have concluded by their June deliberation? You don't have that?

Mr. FRAZIER. No, sir.

Senator EAGLETON. You don't know what it is?

Mr. FRAZIER. No, sir.

Senator EAGLETON. So let's find out what it is and have it for the record.¹⁰

I suggest, Mr. Frazier, that you come back tomorrow to stand by. Mr. Blaylock is going to testify, Mr. Tobias is going to testify. I think Chairman Stevens said 9:30. We will handle the McKee matter first and then go back to the Frazier matter. I think you ought to come back and be available in case there is some other questions that someone might want to ask.

Mr. FRAZIER. Yes, sir.

Senator EAGLETON. Then we will hopefully have this thing from the Society of Federal Labor Relations Professionals. The committee then will be in recess until 9:30 tomorrow morning when we will start out with the McKee nomination.

[Whereupon, at 12:30 p.m. the committee recessed to reconvene at 9:30 the following day, July 17, 1986.]

¹⁰ See p. 56.

**NOMINATIONS OF CROCKER NEVIN, DANIEL R.
LEVINSON, HENRY B. FRAZIER III, AND JEAN
McKEE**

THURSDAY, JULY 17, 1986

U.S. SENATE,
COMMITTEE ON GOVERNMENTAL AFFAIRS,
Washington, DC.

The committee met, pursuant to notice, at 9:31 a.m., in room SD-342, Dirksen Senate Office Building, Hon. Ted Stevens presiding.

Present: Senators Stevens, Durenberger, Eagleton, and Glenn.

Senator STEVENS. The committee will come to order.

Ms. McKee, we will continue now with your confirmation hearing, if we may. You have already been sworn, and you have a written statement in the record. You have furnished the biographical and financial information, which I have examined.

Let me ask you some specific questions.

**TESTIMONY OF JEAN McKEE, NOMINEE TO BE A MEMBER OF
THE FEDERAL LABOR RELATIONS AUTHORITY ¹¹**

Senator STEVENS. Have you made any commitments concerning the policies you will implement as a Federal Labor Relations Authority member?

Ms. McKEE. No.

Senator STEVENS. We have an extremely difficult situation in the overlapping jurisdictions of the EEOC, the FLRA, and the MSPB. Have you examined that situation at all yet?

Ms. McKEE. While I haven't in detail, I am aware that there is some overlapping. I know that the three agencies have had a meeting just within the last month, I believe, to try and understand each other's role, and to better clarify those overlapping situations.

Senator STEVENS. I think that we would welcome a formal understanding between those entities so that all persons concerned will understand the boundaries each occupy. I would encourage you to pursue that.

Ms. McKEE. I will certainly be glad to.

Senator STEVENS. We asked a question yesterday that the FLRA seems to be patterning its activities after the NLRB. Are you familiar with the general approach of the FLRA toward the role of the General Counsel?

Ms. McKEE. I am aware of that role. The General Counsel is an independent person appointed by the President, and does proceed

¹¹ See p. 270 for Ms. McKee's prepared statement.

on the cases under his jurisdiction as an independent person, but has received a budget from the total agency. I have not pursued the matter in specific detail, and if there continues to be any concern, I certainly would feel that it was much better to have heard both sides of the issue before making any statements or presumptions.

Senator STEVENS. Have the people in the area that you are involved with now had any contact or involvement with the FLRA?

Ms. McKEE. In that the Federal Mediation and Conciliation Service does mediate public sector bargaining disputes, but I do not have that responsibility reporting directly to me, so I am aware of the mediating efforts, but not of the specific cases.

Senator STEVENS. Are you aware of any case that you will have to excuse yourself from?

Ms. McKEE. None, Senator.

Senator STEVENS. Have you made any comments about the area of drug testing, or AIDS in relationship to the jurisdiction of the FLRA?

Ms. McKEE. No, I have not.

Senator STEVENS. Do you have any preconceived notions of how those matters are to be dealt with by the FLRA?

Ms. McKEE. Not at the present time. I know that it is a very serious situation, and I heard your comments yesterday and I understand your concern, I certainly would weigh that.

Senator STEVENS. In the area of self-imposed handicaps.

Ms. McKEE. I understand your concerns in that area, and I will certainly look into that very carefully before proceeding in any manner.

Senator STEVENS. Have you had any relationships with Federal unions in your past experience in Government?

Ms. McKEE. Yes, I have, Senator, in that while I was on Senator Javits' staff, here in the Senate, of course, he was on the Labor and Public Welfare Committee at that time, and the ranking minority member, I guess that was the first time I had any contact with the Federal unions, and I have certainly been aware of their presence ever since.

Senator STEVENS. Have you had any difficulties with them in your Federal career?

Ms. McKEE. None that I am aware of, Senator.

Senator STEVENS. Have you made any statements concerning the extent to which they should be permitted or not be permitted to be involved in Federal activities?

Ms. McKEE. No, I have not.

Senator STEVENS. It seems that there has been a tendency on the part of the FLRA not to issue statements or papers concerning the policies or what is to be derived from any particular decision. I understand that they don't have any newsletter, or anything like that. Have you examined into their role in regard to public information?

Ms. McKEE. The only conversation I have had is this morning with a member of the congressional relations staff and public affairs staff who is here. I said to her that I do have a lot of background in that field, and I will be glad to give some guidance and ideas if that seems appropriate, if I am confirmed.

Senator STEVENS. I would invite you to look into the question of whether there should be some sort of a fee attached to the concept of pursuing unfair labor charges before the FLRA. My staff tells me that a considerable number of the charges filed are considered to be frivolous. There could be either a charge imposed by Congress on the filing of such a charge, or the FLRA could have the right to impose some sort of a financial burden if there is a finding of frivolous—something to eliminate the frivolous activities brought before the FLRA. This is something that we would be interested in, so would you keep this Senate committee advised, so that we might pursue our oversight responsibilities, if there is some way that we could reduce the workload by discouraging the filing of frivolous cases?

Ms. McKEE. Yes. I think that there are probably two approaches that I would think of off the top that need to be looked at. One is whether a fee is appropriate or not. I know that it can be very burdensome on some people who do have a legitimate case to put forth a fee in order to support that legitimate case before the Authority. On the other hand, if it is very clear what decision the Authority is making on such cases, it may also inhibit frivolous cases.

Senator STEVENS. The suggestion has been made that there be a fee imposed which would be not payable if the case was meritorious. I don't know that we have ever really addressed that, but I think that we should find out, not from the point of view of raising revenue, but from the point of view of deterring those who are filing the frivolous cases.

Ms. McKEE. I understand that very much, Senator. I certainly will carry your concern with me if I am approved.

Senator STEVENS. Have you been working with the FLRA up to this time?

Ms. McKEE. No, I have not.

Senator STEVENS. What degrees do you now hold?

Ms. McKEE. I have a BA from Vassar College, and a certificate from the University of Southern California's Graduate School of Business, the Winter Executive Program.

Senator STEVENS. I see that you noted American University also.

Ms. McKEE. Yes, I have take a couple of courses there on particular subjects, and one I took was to bone up on writing. Every once in a while, it is good to take a refresher course on something like that, so you begin to clarify exactly what you want to put on a piece of paper when you sit down.

Senator STEVENS. You are currently the Executive Director of the Federal Mediation and Conciliation Service, is that right?

Ms. McKEE. Yes.

Senator STEVENS. Have you had any special training in the area of labor-management relationships?

Ms. McKEE. I don't know that you would call it special training, Senator, but I guess I have never been very far from the subject area since being on Senator Javits' staff, where we were very involved with the Labor and Public Welfare Committee. I have carried that interest forward. I also dealt with the labor relations area to some extent while I was doing governmental relations for the General Mills Restaurant Group, and then the last 3 years with the Federal Mediation and Conciliation Service.

Senator STEVENS. Were you Jake's AA?

Ms. McKEE. Yes, I was. I would just like to note that his son, Joshua, is here in the audience today.

Senator STEVENS. That is fine.

Do you know of anything in your background which might present a conflict of interest with the duties of the office to which you have been nominated?

Ms. McKEE. No, Senator. I have served on the board of a corporation, and I will resign that upon completion of the nominating process.

Senator STEVENS. Which board is that?

Ms. McKEE. It is Inter-America Life Insurance Co., which is an affiliate of the Colonial Penn Group.

Senator STEVENS. Do you know of any reason, personal or otherwise, that would in any way prevent you from fully and honorably discharging the responsibilities of the office to which you have been nominated?

Ms. McKEE. No, Senator.

Senator STEVENS. If you are confirmed, do you agree without reservation to appear and testify before any duly constituted Committee of the Congress?

Ms. McKEE. Yes.

Senator STEVENS. We thank you very much. I am sorry to have inconvenienced you by asking you to come back again today, but it seemed to be the best way to arrange the matters yesterday.

Ms. McKEE. I am pleased to be here.

Senator STEVENS. Thank you very much.

We now have the statement of Kenneth Blaylock, the national president of the American Federation of Government Employees, and he is accompanied by David Rodriguez, labor relations specialist, and Robert M. Tobias, the national president of the National Treasury Employees Union.

Good morning, gentlemen. I also must apologize for our scheduling problems yesterday. I appreciate your courtesy in returning today.

TESTIMONY OF KENNETH T. BLAYLOCK, NATIONAL PRESIDENT, AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, ACCOMPANIED BY DAVID RODRIGUEZ, LABOR RELATIONS SPECIALIST

Mr. BLAYLOCK. Mr. Chairman, I have with me Dave Rodriguez, also, who is one of our labor relations specialists, and has spent many years working with our union in the area of labor relations, and all of the areas where FLRA has its jurisdiction.

I would like to enter my complete statement for the record, and I will summarize it if that is agreeable with the Chair.

Senator STEVENS. Yes, I have reviewed both your statement¹² and Mr. Tobias' statement¹³ and I will ask that they both be printed in the record in full. You may make such comments as you wish to make.

¹² See p. 287.

¹³ See p. 317.

Let me say that the National Association of Government Employees also has submitted a statement, and we will print it in the record after these two.¹⁴

Mr. BLAYLOCK. Mr. Chairman, on behalf of the 700,000 Federal employees that my union represents, we appreciate the opportunity to testify on the performance of Henry B. Frazier, a member of the FLRA, and we request that the members of the committee do a serious investigation into the facts of the performance of this individual. We are here to request that you oppose his reappointment to the Federal Labor Relations Authority.

This is different than a normal initial confirmation, and a lot has been said. We have appeared before this committee and similar committees on the House side many times in the last few years, and we have talked about improving the Federal sector, we have talked about more efficiency in Government. There is a lot being said about performance based pay, and performance standards. We think, Mr. Chairman, that the members of this committee and this body have an opportunity to do a performance evaluation. We see a reconfirmation, really, as a performance evaluation.

The questions before you are not those questions generally raised in an initial hiring, or an initial confirmation. The record shows, in this particular case, that if you use the standards of the law itself that this individual has failed in the critical elements of the position.

Rank and file Federal workers are subjected to a performance evaluation system, both for their career development and for their tenure, and to keep their job. Political appointees are subjected to a different system, but nevertheless the criteria of quality performance, we think, should prevail, and we think that this committee does its job in evaluating the performance of this individual, and you can only come to one conclusion, and that is that he has failed in his performance.

I would just like to briefly run through, in summary, some of the background behind the law. As you will know, Mr. Chairman, my union and I personally supported the Civil Service Reform Act, and we worked very hard to bring that act into law. This particular area, title VII, we all hoped that it would bring some consistency and some order out of the Labor Relations Program that was in total disarray at that point in time, and was not resolving problems at the work site, but it was creating problems.

The situation has not gotten better, it has actually gotten worse. The law itself actually broadened the scope of bargaining from the old Executive order system, but under the interpretation of the law, and the application of the law, in the decisions that have come out of FLRA, it has been narrowed dramatically.

We are at a point now that we basically bargain over parking places and breaktime. In fact, FLRA has said that breaktime itself is nonnegotiable in instances, and that itself has been inconsistent. It takes us about 5½ months on the average to negotiate the average contract in the Federal sector today, and I would remind you

¹⁴ See p. 330.

that there are no economic issues on the bargaining table. We deal totally with the economic issues here on the Hill with Congress.

If you look at resolving problems again, and expediting collective bargaining, it fails dramatically. If you look at the timeliness issue, I would just like to point out, yesterday we sat and listened during the hearing, and there was a lot of statistics thrown out about numbers of cases handled, and numbers of cases that were not handled, but those are just numbers at this level.

Mr. Chairman, at the worksite, those are people, and there is confusion, there is confrontation, there are adversary situations that exist between managers and the people who have been elected to represent the workers, and the workers in a state of confusion.

In our testimony we show the latest averages of the case backlog over there, and it is like 721 days old, and that is over 2 years. To let a contract issue lay on the table for over 2 years, while workers go without a contract, managers are in a situation where they don't know what they can apply and cannot apply, we have destroyed labor relations.

The ULP process, nobody cares about using the ULP process any more because there has only been a slap on the wrist 3 years or 2 years after the incident occurred. Again, it has resolved no problems at all.

The recent court actions, and there has been a lot of them as our unions begin to move into the courts because it does no good to go through the administrative process. Even if we win, we end up in court defending that. Lately, we have been going into court against the FLRA itself. A couple of the committee members cited many of the court decisions that have reversed the FLRA, and that have talked about their untimeliness, their inconsistency, using terms like "it ignores its own rules, and precedents. Their decisions are unreasonable to the point of irrationality, wholly without basis, in law, and no plausible reasons." This is the court itself.

Practitioners themselves, and the Federal Labor Relations Society, in its own survey has come out, both managers, union and third-party practitioners, totally negative in regard to the performance of FLRA.

If you will recall, the thing that we tried to do in the Reform Act was to bring order to labor relations. We decided that we needed a third party. We had two issues to deal with. One was to deal with the protection of the merit system, and we set up the Merit Systems Protection Board to do that. While we have not agreed at times with the Merit Systems Protection Board decisions, the decisions have been in compliance with the law, they generally have been timely, and we take our lumps there. FLRA is just the opposite.

With the Federal Labor Relations Authority, absent having a third party that really plays a neutral role in helping the parties resolve their differences, we will never have a labor relations program in the Federal sector that, instead of creating problems, resolves problems.

At this point, the decisions coming out of FLRA, and the types of decisions, and their processing, are generating more problems than the situation at the worksite. We have had many contracts that were negotiated even under 11491, then renegotiated by managers

and union officials at the local activities under the law itself, FLRA itself has come down and ruled many of the provisions in those contracts nonnegotiable. Those are the cases that we wind up in the courts on.

They have constantly narrowed the scope of bargaining to the point that it is meaningless in the Federal sector today.

As to Mr. Frazier himself, I would just like to make a couple of points beyond my testimony.

We know that was the Executive Director of the Federal Labor Relations Council, which was a management-appointed body to administer the labor relations program, and that was the reason the Congress decided that we needed to have a third party.

Much of the backlog that FLRA picked up initially was brought over from FLRC. There were literally hundreds and hundreds of cases brought over to the FLRA, and they started off with a backlog. Again, you have to remember, this individual was Executive Director and responsible for the process over there.

Mr. Chairman, I played some role in the selection of the initial members of the Authority, because of the role that we played in supporting the act. Working with the administration officials at that time, we tried to determine how we could structure the Authority in such a way that there would not be quick fixes, cheap wins, but that we could really get a viable third party there that would build a good labor relations program, hoping that we could set the pace in Government with a more cooperative program, rather than the adversarial situation.

We decided that that first board needed to be balanced, and one person who needed to be on there was somebody that did understand the Federal sector, and that, of course, is the reason that Mr. Frazier was selected. The other part is, obviously, we had to have people who had private sector-type of labor relations experience and public sector, non-Federal public sector labor relations experience, and an academic background.

Our best hope turned out not to work because being the in-house bureaucrat, being the person inside who understood Government, understood their procurement process, understood labor relations and personnel system, and so on, Mr. Frazier was the guiding person on that Authority as to their processes and their procedures.

Many of their decisions have become so legalistic, and so vague that even after we get them, we still can't understand them.

You can look at the records, and you can look at the GAO report in regard to the purchase of the furniture. You can look at the survey of the Society of Federal Labor Relations. Those are all facts and figures that the committee has available to it.

I noticed yesterday that it was said that we didn't really know how much off the purchase of the furniture was. The GAO report itself points out that everything that was bought over there was at twice the normal cost of GSA prices. That is of record, and that is in the report itself.

The point is, and I will summarize and wind up, you have the records, you have the performance of this individual. It is not an initial hiring. It is a performance evaluation, that is what the reconfirmation process is all about. We strongly feel that the law still

is structured in such a way that we could have a viable labor relations program if that third party functions. We cannot if that third party sees their role as a paternalistic organization designed to basically support management, and basically designed to perpetuate themselves.

One comment on the caseload. There has been a lot said about not having a full board all the time. The law is structured so that even if there is only one sitting member of that board, they still can make decisions.

The backlog being worked off. A recent court action was dismissed because the new chairman assured the court that he would move to reduce that backlog and get a better process going, it is the only reason, if you read that. There is some indication that the backlog is being reduced at this point, but they have fewer employees at FLRA today than they did during the period of time that the backlog was building up.

So to use the fact that there was not a full board as an excuse, is simply just that. To say that we are now straightening it out, you wonder why they are now straightening it out with fewer employees at the FLRA than they had during the time that it was being built up.

The truth is that this particular person is the key person. He is the only person who has been there for the whole life of the FLRA. Many of the problems he generated at FLRC, which we thought we eliminated with the act, he brought right to FLRA.

We ask you, Mr. Chairman, to give serious consideration to his performance, not to his initial qualifications, as you make the decision. We think that if you do, you will not reconfirm this individual to this important position.

Thank you very much.

Senator STEVENS. Thank you very much.

Did you have anything that you wanted to say, Mr. Rodriguez?

Mr. RODRIGUEZ. No.

Senator STEVENS. Mr. Tobias.

TESTIMONY OF ROBERT M. TOBIAS, NATIONAL PRESIDENT, NATIONAL TREASURY EMPLOYEES UNION

Mr. TOBIAS. Thank you, Mr. Chairman.

NTEU is a union of 110,000 Federal employees in 16 different agencies. We have been very active in the Federal sector labor relations program since the late 1960's. We have been involved in negotiating contracts, filing law suits, lobbying Congress, and so forth, concerning problems of employees in the Federal sector.

Fortunately, or unfortunately, I have been in the position of having read every one of the decisions that the FLRC put out, and now that the FLRA put out, in my various positions in this union. I suppose, one of the few people in this town who has had that unenviable task. But on the basis of that, I think that we are experienced and knowledgeable about the process of labor relations in the Federal sector.

As we begin, I want to assure this committee that we have not come here to complain about the substance of any decisions issued by Mr. Frazier. We do not believe that labeling him promanage-

ment or pronoun is helpful to anyone today. Our concern is rather with the issues that we believe that the Senate should be focused upon:

Has Mr. Frazier properly managed the program?

Has he acted to ensure that the FLRA has provided the parties with leadership in this program?

Does his personal behavior show he is worthy of Senate confirmation and to be entrusted with control over this program for the next 5 years?

As it has been said before, Mr. Frazier's nomination differs from that of so many others because in this case the Senate is examining whether to reconfirm him. This is not his first nomination, so we are not going on whether or not he can do something. We are looking at whether or not he has done something.

If the Senate votes to confirm him, it will be voting to accept the record he is responsible for. If it rejects his nomination, it will be sending a signal that it is displeased with his record, and it wants the agency to act more efficiently. One way or the other, the committee will be taking the responsibility for the past and future performance of the FLRA.

Our analysis shows that the performance in each of these areas is woefully deficient. At the conclusion of our presentation, we will ask the Senate to deny reconfirmation because this multimillion program he has managed and guided shows serious failings on all fronts, and no examples of excellence.

Mr. Frazier is not just another member of the Authority, a mere one vote out of three. He is the one constant thread running through the fabric of FLRA failures. He is a holdover from the old FLRC Program. He is the only member remaining from that period. He has built a unitary staff that in truth serves him rather than the Authority, resisting all change. He has presided as Acting Chairman during a time of critical decline of the agency.

Mr. Frazier has been associated with Federal sector labor relations since the mid-1960's when it was created through a series of Executive orders. He served as the Executive Director of the FLRC, a body of agency managers which set program policy.

When the Congress rejected the Executive order concept in favor of a statutory basis, it replaced the FLRC with the FLRA, but Mr. Frazier continued with the program through his appointment to the FLRA. Although some remarked that his experience would be valuable to the new program, others, such as ourselves, questioned whether or not the effect of his appointment would be to doom the new program to be a mere image of the old one, with all the flaws Congress sought to override with the passage of the statute. We believe that we have been proven correct based on his management, leadership, and personal behavior while at the FLRA.

During the course of Mr. Frazier's tenure, which is the entire life of the FLRA, no fewer than three GAO reports have been issued dealing with the FLRA's performance. Each has severely criticized the Authority's inability to timely process its caseload. Because the GAO estimated the cost of processing a single unfair labor practice in 1982 to be as high as \$21,000, it identified timely case processing as a primary goal for the Authority.

At the time of the first GAO report, of the 427 ULP's pending at the Authority, the median age was 288 days. In its most recent report, GAO found the media age of these cases had climbed to 655 days. This is a report that was issued in March 1986, this is not something that covers some period of time that is obsolete. This is March 1986, and 655 days is the median age.

Even more startling is what has happened to negotiability cases. These involve labor-management parties temporarily breaking off bargaining to pursue a ruling as to whether the proposal is legally negotiable. Under the statute, these cases are entitled to the most expeditious possible review. In its report, the GAO found that one-third of these cases were over 721 days old.

This is like a congressional committee adjourning temporarily to pursue a decision on a rule, only to have to wait 2 years for a decision. The taxpaying public could justifiably roar with laughter over performance statistics like this. It is numbers like these that cause the general public to be disgusted with Government.

Perhaps more important is the enormous cost invested by the taxpayers in this cumbersome litigation, only to have a decision rendered long after the time sensitive controversy has passed.

The FLRA has been repeatedly censured by the courts for this dismal performance, and narrowly escaped being forced by a writ of mandamus to issue negotiability decisions far more quickly. We have focused a great deal on this latest decision, but we have been in the courts over the last 3 years seeking mandamus on individual decisions by the courts, and what we found is that when we would cite four or five cases that were egregiously old, the FLRA would issue a decision, and moot our case.

This is not changing the system to issue decisions more quickly. All this is is responding to court litigation to escape a mandamus action. It would seem to me the most embarrassing possible thing that could happen for a court to censure an administrative agency for being too slow. It doesn't happen in our Government, and yet the FLRA has been constantly threatened with mandamus actions.

Last year, the Society of Federal Labor Relations Professionals, the professional society for Federal sector representatives surveyed its members to determine their views on the Federal sector labor management program. These professionals who work with the program every day responded that 70 percent believe the Authority's negotiability and unfair labor practice decisions are seldom timely. In short, the Authority's poor performance is unacceptable and unexplainable to the vast majority of practicing professionals, labor and management.

It is important to remember that the GAO found the cost of processing a ULP to be \$21,000 in 1982 dollars. For each week the Authority fails to issue a decision on a question of law, new cases are filed on the same issue by other parties, and that means that another case comes into the system incurring its daily share of the \$21,000 cost.

In 1986, the GAO found that there were as many as 89 cases pending on the same issue. That is a waste of \$1.8 million. At these prices, someone needs to ask why, after three critical GAO reports, this is allowed to continue.

Mr. Frazier and his staff are the constants throughout this performance. During his acting chairmanship, things went from bad to worse. FLRA member McGinnis, who left the FLRA in 1985, publicly railed about this outrage. He blamed Mr. Frazier and the FLRA staff loyal to him. This group had created a 15 step procedure to process cases.

Member McGinnis noted that the NLRB and many State labor agencies process much larger inventories faster, but that Member Frazier resisted these practices because it would break up the entrenched staff. When contacted by the media, Mr. Frazier's only rebuttal was that case processing was almost as slow after Mr. McGinnis arrived as before.

If that was the only defense offered by one of our bargaining members to allegations of inefficiency, he would be soon unemployed. Certainly, if one of the Members of the Senate attempted to defend poor performance in this way to a constituent group, he or she would not make it through a primary. Why should Mr. Frazier be allowed to keep his job if that is his only response to a poor record.

Again, the only constant during the early years of this Authority, when this delay developed, was Mr. Frazier and his staff. Mr. Frazier has continually resisted adopting the NLRB staff structure, indeed, the standard administrative staff structure, which gives each board member his or her own staff.

Obviously, a unitary staff benefits only that member who outlasts all the others, because the staff knows that member has more control over their future. In this case, Mr. Frazier has used it to resist change at the price of timely, low-cost case processing.

I would like to state that Mr. Frazier's response yesterday that Mr. Calhoun has endorsed this unitary staff structure, I think is somewhat of a misstatement. Certainly, it is my understanding that Mr. Calhoun has the program under study. He has only been there for a few months, and he has agreed to continue the program as a unitary staff structure until he is more familiar with how the staff structure works. He is certainly not committed, wedded, or believes that this kind of a system is the most efficient way of processing cases.

NTEU has been able to focus the blame for this problem even more clearly on Mr. Frazier. We have obtained records which show that as of the week of June 20, 1986, the FLRA staff had 72 cases before the current members of the Authority, Messrs. Calhoun and Frazier. These cases were ready for decision. Of the 72, Chairman Calhoun had issued his vote in 33, yet Member Frazier had been able to get around to deciding only 12 of them, even though some of them had been forwarded to him ready for decision over 6 months earlier.

It is hard to imagine a reason why Chairman Calhoun, a relative new comer to this area of the law, could produce decisions almost three times as fast as someone as allegedly experienced as Mr. Frazier. The desire to reflect is helpful, but the inability to decide at a reasonable pace is destructive.

I think that it also shows, in response to some of the statements Mr. Frazier made yesterday, that it is the system that is inhibiting quick decisionmaking. I think right here the statistics show and

focus clearly and specifically where one of the major bottlenecks in speedy decisionmaking happens to be, and I think that it is right at the feet of Mr. Frazier.

It is thus apparent that Mr. Frazier continues to be the most significant roadblock to solving this problem. The most efficient Chair imaginable cannot move cases if a member just refuses to vote. The case management problem can be laid very largely at Mr. Frazier's door.

Based on this record, the committee must ask what can be done to overcome the resistance to change despite three GAO reports. Surely, 89 pending cases on a single issue with costs of up to \$21,000 per case is not an example of petty cash problems. It is clearly something the Senate should consider in reaching a decision about whether to endorse or reject this performance record.

We strongly suggest that the clearest signal of Senate displeasure that can be sent is to deny Mr. Frazier reappointment and end this costly period of the Authority's history.

A second question we recommend you examine is the leadership provided the program during Mr. Frazier's tenure. Leadership involves the ability to pick a direction and give appropriate and clear guidance to the parties in moving toward a goal. It is measured by the clarity of the message, the reaction of the parties, and the courts, and the support received from the professional community.

Under Mr. Frazier's stewardship, the FLRA failed on all counts. The most startling evidence in this area comes from the society's survey, 60 percent of the labor and management respondents to this 1985 survey said that the FLRA has not been particularly consistent in its development of the law. When we looked behind that attitude, we found the reasons why.

In the period immediately preceding Mr. Frazier's appointment as Acting Chairman, the Authority upheld its ALJ's in 79 percent of their decisions. Similarly, arbitrators were upheld about 66 percent of the time. These statistics are based on volume 16 of the Authority's decisions. These numbers show that, although still developing, case law was fairly clear and predictable.

Then, by volume 19, Acting Chairman Frazier had turned these numbers upside down. A review of the decisions shows he personally voted to reverse ALJ decisions 73 percent of the time, and arbitrators 87 percent of the time. This is unprecedented in the entire area of administrative law to our knowledge.

Without any concern for whether these cases were pronoun or promanagement, it is clear they are being received by practitioners as a message that settled case law is up for grabs, and issues previously understood now need to be relitigated. At \$21,000 a case, Mr. Frazier has been a very costly appointment. His personal habits are too expensive for these times.

I might note that even though these ALJ's have been reversed, the FLRA has yet to clearly and distinctly on the record state in its decision that it is reversing a prior decision. It doesn't say that, and it doesn't provide any rationale for turning these decisions around, which again contributes to the unpredictability of its decisionmaking process.

Lest anyone be left with the thought that perhaps Mr. Frazier is right and everyone else is wrong, we have looked into how the

courts have treated FLRA decisions during this time. Since July 1984, the courts have overturned, remanded, or otherwise refused to support FLRA decisions 28 percent of the time. By contrast, during the same period, the NLRB's decisions were rejected by the same courts only 6 percent of the time.

The obvious message from this to the practicing community is not simply that the Authority's decisions are being reversed at an unprecedented rate, but that with an only one in three chances of winning, a party who lost in the Frazier FLRA is well advised to move to the courts. Naturally, this will raise case processing costs even higher.

Ironically, in one recent decision, the court squarely faced the situation where the Authority reversed several of its ALJ's on an issue. The court sided with the ALJ's, stating that the FLRA's decision was not supported by substantial evidence, and was an unexplained departure from precedent.

In recent months, the courts have criticized FLRA as "clearly incorrect," "failing even to consider the relevant issues," "straining the language of the statute at every term," and "running counter to the undisputed evidence."

Acting Chairman Frazier's leadership has been marked by confusing the labor-management community about the direction of the law, while experiencing an unprecedented rate of reversals by the courts. Only a palm reader could tell you the future of a case today. That may mean a period of full employment for lawyers as the community relitigates previously settled issues, but it will be at the expense of the U.S. Treasury.

If, as the courts have said, the FLRA repeatedly fails to explain its reversals of precedent, it strains the imagination to say that the Authority is leading this program in a direction beneficial to the Government.

I might add that I find Mr. Frazier's comments about engaging a consultant to teach the staff how to write as a solution to the problem of unclear decisions without rationale. It is my understanding that the members of the Authority take the responsibility for the decisions, take responsibility for the clarity of the decisions, and that is, in fact, why they are confirmed or not confirmed.

It seems to me that Mr. Frazier was admitting that over this period of time that he has been there, all of these years, that the decisions have been unclear, and his solution to the problem is to get a writing consultant in to teach the staff how to write. I would suggest that that is his role and his responsibility, not that of a consultant.

The final question to which we direct your inquiry is Mr. Frazier's professional behavior while at the Authority. It is our opinion that he has run the Authority without regard to his responsibility to other members, and that he has displayed a double standard when evaluating his own behavior versus that of his colleagues. There is no reason to believe that this will not continue and further damage the Authority at public expense.

As you are probably aware, when member McGinnis left the Authority, he publicly denounced Mr. Frazier. He said he had to constantly fight to overcome the Acting Chairman and his entrenched staff. This comes as no surprise. Not only did Acting Chairman

Frazier force member McGinnis to go through 15 steps to decide a case, but Frazier kept information from McGinnis.

McGinnis revealed that Frazier had even denied him access to agency budget information. Furthermore, GAO found that Frazier had decided, after consulting with a staff member that 89 cases would not be put before member McGinnis for a vote.

McGinnis was never told of this decision. This example outlines the essence of Mr. Frazier's approach to Authority business. He seems to act as if the FLRA is his domain, and his staff outranks presidentially appointed members, with the apparent rationale that only he really knows and understands the Federal sector. As a result, he is justified in doing whatever is necessary to keep his vision alive.

A different type of abuse arose at an earlier time. In connection with the PATCO decisions, it is well known that member Frazier reported member Applewhaite to the FBI for an alleged illegal ex parte communication with a union president unconnected with the case. Yet, many forget that member Frazier also had two ex parte conversations about the same case—one with Secretary Lewis, the actual management party to the case, and one with the AFL-CIO representative appointed to settle the case. In neither case did Mr. Frazier report these incidents to the FBI, instead he called in one of his staff and asked if the staff member agreed these conversations by Frazier were acceptable. The staff member agreed and Frazier considered it closed.

As we said at the outset, we believe the reconfirmation should not be automatic, but should be earned. We emphatically believe that Mr. Frazier has not earned this honor. During his tenure, particularly during his time as acting chairman, cost and case processing timeframes have climbed to laughable heights. The courts have reversed the Authority at more than four times the rate they reversed the NLRB, and staff members have been given more information and decisionmaking power than the other presidentially appointed members.

Our statement has not been about the substance of Mr. Frazier's decisions, or his treatment of unions. We are not here with a replacement candidate at the ready. We know that the President could very well appoint someone to replace Mr. Frazier who could do the unions even more harm.

Yet, with two confirmed members, the Authority can continue to operate, and the new chairman can begin to get control over his staff. The ways of the Executive order, which Hank Frazier brought with him, can finally be put aside and the law can begin to adapt to the 1980's. We strongly urge the Senate to reject this nomination.

Thank you, Mr. Chairman.

Senator STEVENS. Thank you very much.

I am going to yield to Senator Eagleton first, and see if he has any questions of you two gentlemen.

Senator EAGLETON. Thank you, Mr. Chairman.

Yesterday, Senator Gore raised an issue of a questionnaire that had been sent out by the Society of Federal Labor Relations Professionals. I will pass it out to Mr. Blaylock and Mr. Tobias.

While it is coming down, may I ask, have you all had occasion ever to read that survey?

Mr. TOBIAS. I certainly have.

Senator EAGLETON. I ask unanimous consent that the survey be placed in the record.

Senator STEVENS. So ordered.

[The document referred to follows:]

FLRA SURVEY

During the latter part of 1975 the SLFRP Board of Directors sent to its 655 members the questionnaire set out below. As of February 19, 1986, 122 responses were received (approximately 19%). Of these 51 were from management representatives, 36 from labor, 26 from neutrals, and 9 did not state their affiliation. The Board will consider the implications of the degree and nature of the responses, and following the June Board meeting will formally report its views. In the interim the Board has voted to provide the raw data to the members for their information. These data are contained in the table following the last question. The first four columns contain the number of responses from management, labor, neutrals and unidentified. Then come the total and its percentage (rounded to nearest whole number).

1. Please circle your affiliations: Management, Labor, Neutral.

ARBITRATION APPEALS

2. Regarding those cases where the FLRA has addressed the merits of arbitration appeals, to what extent do you believe the Authority's reasoning behind the decisions is clear?

- a. Very clear.
- b. Sometimes clear.
- c. Not very clear.
- d. No opinion.

3. How would you describe the extent to which the FLRA has reversed or modified arbitration awards?

- a. Excessive.
- b. Only to the extent required by the Statute.
- c. Not enough.
- d. No opinion.

4. How would you describe the overall effect the FLRA has had on the use of arbitration to provide final and binding resolution of disputes?

- a. The FLRA has hindered resolution.
- b. The FLRA has helped resolution.
- c. The FLRA has had no effect.
- d. No opinion.

5. To what extent do you believe the FLRA position on Stays of Awards is helpful to the arbitration process?

- a. No effect.
- b. Helpful.
- c. Not helpful.
- d. No opinion.

6. To what extent do you believe the FLRA is timely in deciding arbitration exceptions when it addresses the merits?

- a. Untimely.
- b. Timely.
- c. Depends on the issue.
- d. No opinion.

NEGOTIABILITY

7. How would you describe the FLRA's overall approach to negotiability decisions?

- a. Too restrictive a view of subjects open to collective bargaining.
- b. Too broad a view of subjects open to collective bargaining.
- c. An accurate view of what the Statute permits to be bargained.
- d. No opinion.

8. Regardless of whether you agree with the decisions, please describe the overall clarity of the FLRA opinions.

- a. Well written, logical and clear.
- b. Poorly written, conclusionary, unclear as to legal principles.
- c. Too varied to describe.
- d. No opinion.

9. Generally, to what extent can you rely on the FLRA decisions to determine whether issues before you are negotiable?

- a. Easily, as the FLRA principles are clear.
- b. Depends on the issue.
- c. Very difficult, as FLRA principles are not often clearly stated.
- d. No opinion.

10. Do you find the FLRA negotiability decisions timely?

- a. Seldom untimely.
- b. Seldom timely.
- c. No opinion.

FINAL AUTHORITY DECISIONS

11. To what extent do you find the FLRA consistent in its development of the law?

- a. Reasonably consistent.
- b. Not particularly consistent.
- c. No opinion.

12. How would you rate the quality of the FLRA written decisions?

- a. Well written (clear and concise).
- b. Inconsistent.
- c. Not very well written (unclear, redundant).
- d. No opinion.

13. How would you describe the extent to which the FLRA has reversed or modified ALJ decisions?

- a. Excessively.
- b. Not enough.
- c. No opinion.

14. How would you rate the timeliness of the FLRA's decisions in the ULP area?

- a. Timely.
- b. Untimely.
- c. No opinion.

15. Do you believe the FLRA has developed reasonable remedies for violations of the Statute?

- a. Overall, yes.
- b. Overall, no.
- c. No opinion.

GENERAL

16. Overall, how would you rate the FLRA's performance in providing leadership and directions for Federal Sector Labor Relations?

- a. Effective.
- b. Ineffective.
- c. No opinion.

17. Overall, to what extent do you believe the FLRA has improved the Federal Sector Labor Program over the past five years?

- a. Improved the program.
- b. Harmed the program.
- c. No change the the program.

18. Compared with the Executive Order Program it replaced, do you believe the Federal Sector Labor Program has been an improvement?

- a. Overall, yes.
- b. Overall, no.
- c. No opinion.
- d. No change.

Please feel free to include any comments you wish the Board to consider. Thank you for your time.

SURVEY DATA

Q	M	L	N	U	T	X	Q	M	L	N	U	T	X
1	51	36	26	9	122	100	9a	4	23	2	3	32	26
2a	7	3	5	1	16	13	b	34	10	11	2	57	47
b	35	9	15	5	64	53	c	12	2	12	2	28	23
c	7	24	4	3	38	30	d	1	1	1	2	5	4
d	2	0	2	0	4	3	10a	3	2	7	1	13	11
3a	10	29	12	1	52	42	b	40	30	13	3	86	70
b	27	1	9	6	43	35	c	8	4	6	5	23	19
c	9	2	1	0	12	10	11a	27	3	6	3	39	33
d	5	4	4	2	15	12	b	22	30	18	3	73	60
4a	15	28	15	1	59	48	c	2	3	2	3	10	8
b	13	2	1	4	20	16	12a	17	0	6	3	26	21
c	17	4	7	2	30	25	b	20	19	7	2	48	39
d	6	2	3	2	13	11	c	11	12	11	2	36	30
5a	8	0	3	0	11	9	d	3	5	2	2	12	10
b	15	2	3	5	25	21	13	deleted from survey					
c	15	28	14	3	60	49	14a	12	4	2	0	18	15
d	13	6	6	1	26	21	b	35	30	17	4	86	70
6a	28	28	17	5	78	64	c	4	2	7	5	18	15
b	1	0	2	0	3	2	15a	33	1	3	3	40	33
c	12	8	3	3	26	21	b	16	34	19	3	72	59
d	10	0	4	1	15	12	c	2	1	4	3	10	8
7a	16	35	18	2	71	58	16a	23	2	5	4	34	28
b	14	0	4	2	20	16	b	22	30	17	4	73	60
c	19	0	2	3	24	20	c	6	4	4	1	15	12
d	2	1	2	2	7	6	17a	28	3	7	3	41	34
8a	12	1	1	2	16	13	b	13	28	12	3	56	45
b	11	22	13	2	48	39	c	10	5	7	3	25	21
c	27	10	10	3	50	41	18a	22	9	9	4	44	36
d	1	3	2	1	7	6	b	16	18	6	3	43	35
							c	8	5	4	2	19	16
							d	5	4	7	0	16	13

Senator EAGLETON. It is a four-page questionnaire, and apparently—I don't know who on the staff contacted this Society of Federal Labor Relations Professionals, but there has been no follow up to it. There was some thought that there was going to be some June followup, but apparently there has not been. This is it.

To clarify that issue, it says up here at the top:

During the latter part of 1985, the BLFRP Board of Directors sent to its 655 members the questionnaire set out below. As of February 19, 1986, they had received 122 responses—approximately 19 percent.

Then they went on to break down the responses to the survey. Of these, 51 were from management representatives, 36 were from labor, and 26 from neutrals. Nine did not state their affiliation.

As I quickly read it, and I quickly read the numbers, I conclude as follows, and then I will ask you gentlemen if you make the same conclusion. My reading of this survey of the FLRA—it is not a survey of Mr. Frazier, it is a survey of the FLRA, and Mr. Frazier is one of the three members—the FLRA gets acceptable or passable marks from the management respondents, average to passable marks from the so-called neutral respondents, and failing marks from the union respondents to the survey. Is that how you interpret it, Mr. Blaylock?

Mr. BLAYLOCK. I think the numbers, when you break each individual issue down, Mr. Chairman, come pretty close together, closer than that on occasion, but on the average I would say that you are right.

I would like to point out, as I said in some of my general comments, the old FLRC was a management appointed organization, with the authority of administering the labor relations program. Those of you who remember those days, it was totally confused.

We think that it still is dominated by that philosophy, that it does not operate as a true third party. Let's face it, when we have a collective bargaining situation in the field, the union is proposing certain conditions be put into the contract. There has been a climate created to continue as adversary process in the Federal sector. Management generally opposes those things, and the FLRA, just like the FLRC, backs them up.

I would say to you that the union officials, and the union rank and file throughout the country see the FLRA as part of management. For a union trying to get a contract, and the FLRA waiting 2 years to make a decision on the negotiability issue, management really doesn't care in a lot of cases whether they make a decision or not, but the union sure cares, and there is no lever to balance that now. As you well know, we don't use strike in the Federal sector, it is prohibited by law. There is no economic lever, although there is a lot of taxpayer bucks included in the problems that are created as Bob just pointed out to you.

I would say, in general, you are right, but the numbers are closer together than to say that they don't generally agree. Most of the practitioners generally agree that really FLRA is frustrating the process, not accommodating it.

Senator EAGLETON. Before going on to Mr. Tobias, just a comment on the tag end of Mr. Blaylock's answer. We move this room to the Labor and Human Resources Committee for an oversight

hearing on the NLRB, with Senator Hatch chairing rather than Senator Stevens. If Lane Kirkland were testifying in an oversight hearing on the NLRB, wouldn't he use virtually the same language you used in the last two-thirds of your answer?

The first third dealt with the survey, but the last two-thirds was your comment on the general trends of the FLRA in terms of their decisionmaking process, et cetera, whether they tilt this way or tilt that way. Wouldn't Mr. Kirkland, or some other spokesman from the AFL-CIO, perhaps you, make the same comment about the NLRB?

Mr. Blaylock. With the NLRB, probably so. A few years ago, I think the NLRB was looked at by all parties as really expediting the process in the private sector. Recently, as you well know, they have reversed themselves on many precedent decisions and rules that had been in effect for a long time.

Lane would have to speak to that, because I am not sure, but I don't think that he would run into the timeliness problem. I am not sure that they would run into the problem of clarity of decisions. NLRB decisions are coming out pretty clear. They are reversing a lot of previous decisions. The sloppiness, the timeliness, and inconsistency, I am not sure that he would say that on those issues, but the substance of the decisions, he probably would.

Senator EAGLETON. Now, back to you, Mr. Tobias, and the question in on the survey. You heard the question that I propounded to Mr. Blaylock.

Mr. TOBIAS. Yes, I did.

Senator EAGLETON. I gave you my sort of summary reading of these 122 responses.

Mr. TOBIAS. I think that the report card is not passing.

Senator EAGLETON. One can conclude that it isn't passing, but I broke it down by groups.

Mr. TOBIAS. By managers, it is not passing. I will take question 2, it says, regarding those cases where the FLRA has addressed the merits of arbitration appeals, to what extent do you believe the Authority's reasoning behind the decision is clear?

The group, by 60 to 70 percent, says, "Not very clear, but sometimes clear, and only a small minority says, "Very clear."

"How would you describe the extent to which the FLRA has reversed or modified arbitration awards?" These is a passing grade, only to the extent of being modified by law.

The timeliness question, under question 6, "To what extent do you believe that the FLRA is timely in deciding arbitration exceptions?" This group says, by the vast majority, about 70 or 80 percent, that the FLRA is untimely. This is the management group.

When you talk about clarity of decisions, again about 70 percent say that the FLRA is too far over the lot, all over the lot in writing decisions, a very bad opinion of managers of the FLRA's ability to write clear decisions.

On question 10, about FLRA negotiability decisions, 80 percent of the managers say that the FLRA is seldom timely—seldom timely. There are management people saying, "seldom timely."

Question 11, about 45 percent say that the decisions are not particularly consistent.

Question 12, "How would you rate the quality," about 60 percent there say that it is inconsistent.

Then when you get down to the critical question, question 16, leadership, about 50 percent of the managers rate the FLRA as ineffective in leadership.

I don't consider those kinds of statistics by managers evaluating other managers, their management style, as a passing report card. Untimely, inconsistent, lack of leadership, the critical decisions by which people ought to be judged, and these management groups are saying that the FLRA has failed. I think that they are in the failing column, and not in the passing column.

Senator EAGLETON. You have given a very comprehensive and intelligent answer. It is important to have it in the record, although I think my summary of breaking it down by category, if that is important at all, and one can debate whether it is important—

Mr. TOBIAS. These are only management. I only answered management.

Senator EAGLETON. You were giving me the overall, and I was breaking it down into groups.

Mr. TOBIAS. No. My answer, Senator, was limited strictly to the management category. I wasn't even talking about unions or neutrals.

Senator EAGLETON. I won't go through each one, but for instance, starting at the top, regarding those cases where the FLRA has addressed the merits of arbitration appeals, "to what extent do you believe the Authority's reasoning behind the decision is clear?"

Then the answer, you get a choice; very clear, sometimes clear, not very clear, and no opinion. If you add up very clear and sometimes clear, in the way you do in political polls, it comes out 13 and 53, and that adds up to 66, for what it is worth.

Mr. TOBIAS. If you add up the sometimes clear and not very clear, which is the way polls get added up also—

Senator EAGLETON. That is the way you add up your opponent's polls, and then when you issue a release, you are ahead by 20 points. [Laughter.]

Senator STEVENS. You understand that in our business 50.001 is passing.

Senator EAGLETON. That is a landslide.

Mr. TOBIAS. But that is not passing for a Federal employee.

Senator EAGLETON. One has to ask whether 122 responses constitute an authoritative base of interpretation, but the survey is worth what it is worth, and there are some criticisms in it as you candidly and cogently pointed out. There is no question about that.

Now let's get to the question of clarity of opinion. I have not read one FLRA opinion written by anyone ever.

Mr. TOBIAS. That makes you ahead of the game.

Senator EAGLETON. You have read them all.

Mr. TOBIAS. Unfortunately, yes.

Senator EAGLETON. I am going to leave the Senate, and dabble in the law—I hope that Ted Stevens refers me some good stuff—I am just going to dabble, and I don't intend to read any FLRA opinions then. So I can't vouch on a first hand basis as to clarity, or lack thereof, but you are a far more intelligent witness on that because you have read them all.

Let me just say this about opinion writing. When you write legal opinions that are subject to judicial review—I understand, and I am not an authority on this, that half the cases of the FLRA are subject to review. Is that right?

Mr. TOBIAS. It is 28 percent.

Senator EAGLETON. I have a note here. In its 7 years, the FLRA has decided about 3,000 cases, of which 1,500 have been reviewable. Apparently, the way I read this, half were reviewable, and half weren't. Is that about right?

I will ask Mr. Frazier. Is that right?

Mr. FRAZIER. Fifteen hundred were reviewable.

Senator EAGLETON. Of that, 370 have, in fact, been appealed. Is that right, Mr. Frazier, roughly?

Mr. FRAZIER. Roughly, yes, sir.

Senator EAGLETON. When you write an opinion that is reviewable, that is reviewable by the courts, quite frankly, as a lawyer of 30 years, you do write in some legalese. You just don't write it as you write a letter, Eagleton writing to Mr. Tobias, or Eagleton writing to Mr. Blaylock, where we are using commonsense language, commonsense expressions, clear sentences. You legalese it up because some court is going to review it, and they are imbued in legalese.

So it is not as if you can write something that you can take out to the shop steward, or to the average person, and say: Here, this is as clear as a bell, written in layman's English, and everybody in the world can understand what this agency held.

Maybe they ought to be written that way, but as long as the country is overendowed with lawyers—we just graduated 38,000 new ones last month to further clog the stream, and there are 80,000 more already in law schools, in the pipeline coming up to clog the stream—as long as we are overlawyered in this Nation, opinions of agencies are going to be written in legalese. It is sad to say that, but that is the case. They are just not going to be readily interpretable by the man on the street.

Take the Gramm-Rudman opinion, I have read it three times, from the U.S. Supreme Court, 7 to 2. It takes you about three times, and maybe it will take me three more to fully comprehend the reasoning of the court in reaching the judgment that it reached. I understand the bottom line. They declared certain sections of the statute unconstitutional, and I understand that, but I cannot say that I fully understand yet the intricacies of the reasoning of the highest court in the land in achieving that decision.

Do you want to comment on that?

Mr. TOBIAS. Senator Eagleton, what I would say is that, yes, I understand the need to write for courts, but I also understand that the FLRA has failed, because 28 percent of the decisions that have been written and reviewed have been reversed, which is an abysmal record for an administrative agency.

So even if they have tried to write for the courts, they haven't quite made the grade in relation to the other administrative agencies doing the same kind of work.

Second, I think that the thing that I complain about in the FLRA decisions is really its lack of rationale when it shifts policy,

and its lack of candor in telling the community it has reversed policy.

As I said, there hasn't been on decision where the FLRA has said: Hey, look, folks, we have been going down this road. We made a mistake. Times have changed. Under our Authority, we would like to go down this road. Here are the reasons why we went down this road, and now we want to go down that road.

That happens. That is what an administrative agency is supposed to do. What we get instead is a reversal of the policy without rationale. We just get it in a decision, without citing the prior cases, as though we haven't read the prior cases, or we have forgotten about them. I don't think that that is a very responsible approach.

As I have said before, even if they are writing for the courts, to get reversed 28 percent of the time means that they are not quite making the grade.

Mr. BLAYLOCK. Senator, I would like to point out that we understand writing for the courts, but we have lawyers, the agencies have lawyers, and surely the lawyers of FLRA or the board in writing as a third party to assist these parties in resolving their labor relations problems lower down can surely write so that those lawyers of the agencies and the union lawyers can understand them.

As Bob said, it is the lack of rationale that bothers us, and the inconsistency, because if you don't have consistency out there, you will not have a labor relations program.

Senator EAGLETON. Comment on this, Mr. Blaylock, and then Mr. Tobias.

Mr. Frazier, in a speech that he delivered in February 1984, stated as follows: "In three-fourths of the cases in which we, meaning the FLRA, did not prevail, the issues involved interpretations of statutes other than our own."

Do you have your counsel with you today, either one of you?

Mr. TOBIAS. I am familiar with what he is talking about. Your question is?

Senator EAGLETON. Do you think that that is an accurate statement by Mr. Frazier? Is he leveling with the public when he says that?

Mr. TOBIAS. I don't know over what period of time he is counting in terms of the three-quarters of the cases where he did not prevail, but that is certainly no excuse, because he is called upon, as a member of the Authority, to interpret those laws in the context of interpreting the FLRA statute.

Your ability to write persuasively to a court of appeals is measured on that basis, and whether he is interpreting his own statute or another statute is, in my view, not relevant. The fact is, 28 percent of the time he is reversed, and that is the fact.

Mr. BLAYLOCK. If you read that statement again, Senator, it is one of those so-called profound statements. It says that the court held an interpretation different than they held when they were reversed. What else would be turned over on? I don't think that it is a profound statement at all. I think that it is telling, and it is an example of the kind of things we are getting.

Senator EAGLETON. I am not sure that it is profound either.

Mr. BLAYLOCK. I know, but I am saying, what else would the court turn them over on. Sure they found differently, and that is the reason that we went to court in the first place.

Senator EAGLETON. I will move on to this, and then I will have a final either question or comment.

When Mr. Frazier appeared yesterday, we had a chart, that graphically tried to track who was on the job over there at FLRA going way back to 1979. The bottom line on the chart is that the FLRA has seldom had a full functioning Board of confirmed members. Oftentimes, it is operating with two members. Even those times when it has three, it has either a recess appointment, or other kinds of holdovers, who are leaving, but waiting for somebody to come in, so on and so forth.

The chart causes me to think that it is a somewhat chaotic situation structure, a three-member Board. Do you attribute any of the problems at FLRA, and there are problems there, and we will get into the delay matter next, but do you attribute any of those problems to this personnel problem, I will call it, in terms of membership of the board?

Senator STEVENS. If you will yield for just a minute, Senator Durenberger was here for some time, and that was the question that he was waiting to ask, too. I will indicate that this is his concept which needs to be explained here a little further.

He says:

One of the major criticisms that you both raise in your testimony concerns case processing, times, and costs. At the same time, we also know that there have been long periods when the FLRA has had at least one vacant seat. While I acknowledge that slow case processing is a real problem, can we really lay all of the blame for the delay on Mr. Frazier?

Senator EAGLETON. That is now mine and Durenberger's put together.

Mr. BLAYLOCK. First, the law is structured so the FLRA can continue to function and render decisions although there is only one or two members of the Board there. That was put in the law to make sure that that could happen.

The question as to whether the two could agree on a decision or not, obviously, they are not going to issue two decisions, but you have to remember that the charter, the law, and the purpose of the law is to make decisions as a third in moving the labor relations problems at the Federal work sites along.

So while I am sure that is a factor, and it can be an excuse, it sure is not the only contributing factor. A point that I would make in this thing, there were also long periods of time when there were two or more members there, but Mr. Frazier has been there all the time. Many of the reversals of previous actions occurred during the time he either was Acting Chairman or during the Acting Chairman period. The case that was brought out yesterday three times on midterm bargaining, they said, yes, and then an ALJ upheld it, and then they said, no, and then they flopped again. Three times they flopped, and that happened and a lot of the reversals, as Bob pointed out, happened while Mr. Frazier was Acting Chairman.

So, one, they can act, although there is not a full board there. Two, I am sure that it adds to some of the confusion, and it can be used as an excuse. Three, I sure would not contribute all of these

problems. Four, I would point out that a tremendous amount of this backlog was brought from the FLRC, which Mr. Frazier had total control over as Executive Director.

Mr. TOBIAS. I would say that whenever you have a staff, and whenever you have a three-person authority, certainly all of the blame for anything cannot be laid at any one person's feet, or at any one person's door, that would be ludicrous to make that kind of a charge.

However, what I can say, and what I have said, is that when you look at the statistics now, at how long the decisions have sat on Mr. Frazier's desk since Mr. Calhoun has been appointed, that has nothing to do with staff, that has nothing to do with structure, it has only to do with the fact that Mr. Frazier hasn't decided cases. That is one thing to bear in mind.

The second thing to bear in mind is that we are not only talking about timely case processing, which has been a problem since 1970 when the FLRA was first put into effect, but we are also talking about the quality of the decisionmaking process. We are talking about the lack of leadership. When you put all of that together, when you consider all of the factors, then the question is, Does this man deserve to be reconfirmed in his job?

I think that when you look at the whole picture, and put all of the pieces of the puzzle together, the answer has to be no.

Senator EAGLETON. I have no further questions, Mr. Chairman.

I think the most serious allegation in connection with Mr. Frazier is in connection with the tag-end part of Mr. Tobias' answer, especially with respect to the others, including high judicial courts, which have referred to as "intolerable delays."

Perhaps Senator Stevens will get into it, and I don't want to trespass on his ground, but Senator Stevens did pass to me a case that the court of appeals just recently handed down, decided in May 1986, and it has some very, very rough judicial language criticizing and using words like "intolerable delay." I think that this is the single strongest charge or allegation or consideration, whatever word you want to use, in the Frazier matter.

I have no further questions.

Senator STEVENS. I am glad to say that these two statements are very direct and forthright. This issue is not before us on the basis, in my opinion, of whether or not this nominee is prolabor or pro-management. Is that correct?

Mr. TOBIAS. That is correct.

Senator STEVENS. As a matter of fact, I just went back and looked through the last two nomination hearings of Mr. Frazier, and you have not previously opposed him.

Mr. TOBIAS. That is correct.

Senator STEVENS. As a matter of fact, you supported him on the original nomination. Is that correct?

Mr. BLAYLOCK. Yes, sir.

Senator STEVENS. At least AFGE did.

Were you involved in the original selection process?

Mr. TOBIAS. I was not. I did not testify against him, although I had serious reservations.

Senator STEVENS. But there is no testimony here in the last two nominations of anyone except the nominee.

Mr. TOBIAS. That is correct.

Senator STEVENS. It is my understanding that there was an indication that AFGE had supported the nomination.

Mr. BLAYLOCK. That is correct.

Senator STEVENS. In the process now of trying to sort out the track record of the FLRA, your organizations have taken the position that Mr. Frazier's actions as a member of the FLRA do not warrant his being confirmed for an additional term.

You base that upon leadership and management concepts. Is that correct?

Mr. TOBIAS. Yes.

Mr. BLAYLOCK. That is right.

Senator STEVENS. I want to make certain that there is no personality problems involved in this. Have either of you had real personality difficulties with Mr. Frazier? Is there a personal dispute?

Mr. BLAYLOCK. Mr. Chairman, as I stated, in the initial implementation of the act, in working with administration officials, who obviously were working with the Senate, with you and the committee, we were in favor of having an in-house person who understood the Federal sector and the personnel system, and we thought that Mr. Frazier was in the best position to do that.

His first reconfirmation, we did not oppose that reconfirmation. We were beginning to have serious problems with the process, and with the long delays, and the inconsistency, the lack of rules, but it had nothing to do with personality.

With the administration, in the initial filling of the positions, I did not want to go for any type of short, cheap wins. We felt that the system had to have credibility, and if the system did not have credibility, it obviously was not going to be effective, and it wasn't going to last.

I can say to you today, the system does not have credibility with practitioners, with managers, with union types, and with third parties. It is not performing its role, and the only consistent factor that is in all of that inconsistency is Mr. Frazier, who has been there.

We have analyzed this thing, and we have come to the conclusion that the infighting that goes on over the turf, the staff, the positions, the control for chairmanship, is what is destroyed. If we can't make it work, we have to go back and do something, and I think that we would have the support of a lot of managers.

Senator STEVENS. I am impressed with the argument Mr. Tobias has made about the cost of this system.

How many times has the AFGE taken the FLRA to court?

Mr. BLAYLOCK. I don't have that number from the top of my head. We can provide it for you, but we have been to court a lot. We have lost some, just like recently the court dismissed what they dismissed on the new chairman saying "Hey, I am straightening it out. I don't need this hassle."

Senator STEVENS. That is the case I have in front of me. I don't think you can get much out of winning and losing. The question is what was the rationale and what was the order of the court.

I note that the National Association of Government Employees also has taken the FLRA to court and the court said that it noted the inordinate delay in the Authority's handling in the *National*

Federation of Federal Employees' case. They noted that the FLRA's lack of timeliness is extremely disturbing.

It took 15 months for the agency to issue a brief decision. They have, of course, several AFGE decisions noted.

Have your people taken FLRA to court, Mr. Tobias?

Mr. TOBIAS. Absolutely. As I indicated, we started suing for mandamus action, Mr. Chairman, 3 years ago. We would cite 8 or 10 cases on the basis of delay. Then on the day the case was scheduled to argue, the FLRA would issue the last decision that we had cited in the case, therefore, mooted our mandamus action. So what we did was just have a file, when the cases would get 3 years old we would file a mandamus action and that is how we would move them through the FLRA.

We knew as soon as we filed the mandamus action the FLRA would move.

Mr. BLAYLOCK. Mr. Chairman, to go back to the collective bargaining situation that I mentioned a while ago. It is not just statistics up here, and it is not just the budget of the FLRA. The court actions generally take place at the national levels.

When it takes 5½ months to negotiate a contract at an air base, at a hospital, at a Federal facility anywhere in the country, you have union officials on official time, you have managers, personnel officers, labor relations lawyers and managers on the bargaining teams. You have meeting after meeting after meeting that goes down.

We wind up then in appellate processes, and higher levels in the agencies are pulled into it on negotiability issues, as an example. And non-negotiable is the favorite stance taken out there. When you look through the decisions you will see most of those backlog cases are negotiability issues.

That means there are literally hundreds of manhours being spent and there is not an economic issue on the table out there.

Basically, we are arguing over break time and parking places. For FLRA to not be able to expedite the collective bargaining process, it is costing Federal agencies literally millions of dollars. Cost is a factor and should be considered seriously.

Senator STEVENS. That is an interesting point—including the cost of the courts. Notwithstanding what my friend says about our profession, in terms of the clarity of our decisions and the manner in which they are written, there is no reason to cause access to the courts to be sought solely because of the batting record of the agency that is being challenged.

Mr. TOBIAS. That is exactly right.

Senator STEVENS. It should be to the contrary. It should be a warning that if you take the case to court you are not likely to defeat an administrative agency.

Mr. TOBIAS. Just the opposite is happening. Just the opposite. Of course, the cost has several facets. You have the cost of the court, the cost of the delay. You have the lack of credibility of the FLRA itself, which means that more cases get filed initially.

Senator STEVENS. Can you document for the record, Mr. Tobias, some of those incidences in which you filed a mandamus action and the decision was rendered by the FLRA mooted the appeal.

Mr. TOBIAS. Sure, I would be happy to.

Senator STEVENS. And what happened, any kind of series of that type of situation.

Mr. TOBIAS. Sure, I would be happy to do that.

Senator STEVENS. I would appreciate that very much.

Do you have any further questions, Senator?

Senator EAGLETON. I have some questions for Mr. Frazier.

Senator STEVENS. Gentlemen, if you would let Mr. Frazier come back up to the table, we want to ask him some questions based on your testimony. It won't be very long, we ask you if you would wait around a few more minutes. There might be some matters you want to clear up.

Mr. Frazier, would you return. Mr. Frazier, Senator Glenn has submitted a series of questions which I will have the staff provide you and ask you to respond to those questions.¹⁵ I want to ask you some questions now based upon the statements that you have heard. I felt yesterday it was better to have those statements be presented before I asked you about them.

First, I want to refer to the GAO's report that was issued to the House at the request of the House Committee on Post Office and Civil Service. It was Mr. Ford who asked the GAO to look into some activities of the FLRA.

In the course of responding to Congressman Ford, the GAO noted that, "Although the Acting Chairman and the Acting Director for Case Management believes these 89 cases should await a full complement of members. Member McGinnis told us he was unaware these cases were in abeyance for this reason and did not believe they should be delayed."

Did you segregate out from decision these 89 cases, as reported by the GAO?

**TESTIMONY OF HENRY B. FRAZIER III, NOMINEE TO BE A
MEMBER OF THE FEDERAL LABOR RELATIONS AUTHORITY**

Mr. FRAZIER. The—

Senator STEVENS. That is just a yes or no, so let's get on with it. Did you do it or didn't you?

Mr. FRAZIER. We identified 89 cases to be held in abeyance, yes.

Senator STEVENS. We, meaning you and a member of the staff?

Mr. FRAZIER. And Mr. McGinnis when he came on board. This developed before he came on board, but I have got documentary evidence on it, if you would like it.

Senator STEVENS. You want to challenge Mr. McGinnis' statement to the GAO that he was unaware that these had been set aside? Is that right?

Mr. FRAZIER. Yes, sir.

Senator STEVENS. Tell us, what evidence do you have contrary to Mr. McGinnis' position.

Mr. FRAZIER. This allegation was raised once before in a budget hearing at OMB by member McGinnis. He subsequently held a press conference when he left the agency and made the allegation again. Mr. Tobias' remarks about my response to his comments

¹⁵ See p. 219.

were directed toward comments that might have appeared in the press at that time.

Senator STEVENS. You and I are going to get along much better if you answer my questions.

Mr. FRAZIER. Yes, sir.

Senator STEVENS. Not the questions of someone else. I asked you to tell me if you have any evidence where Mr. McGinnis has stated that his comment to the GAO was not correct?

Mr. FRAZIER. Yes, sir. Soon after Mr. McGinnis assumed office he was presented with background materials on the status of operations at the FLRA. Among those materials were two volume source books prepared by the Office of the Solicitor.

At tab C in volume II was a memorandum on the subject: "Background Materials Relating to the Issue of Negotiability of Travel and Per Diem Expenses." That memorandum explained that the issues pending before the Authority, said and in pertinent part, that "a number of other cases," in addition to cited negotiability case "are pending before the Authority. A list of those cases, identified by the Office of Chief Counsel is set at Attachment 13."

These were in abeyance when he came on board and we gave him lists.

At tab D of volume II, we identified "The Standard for Determining the Duty to Bargain Over Appropriate Arrangements Under Section 7106(B)3."

There were the excessive interference matters that were discussed yesterday, and we said in the memo the "negotiability staff has identified at attachment 9, 14 cases that are currently at step 14," which is in the abeyance step of the case-handling process.

Further, in an addendum to volume II there is a section entitled "Cases Which Present Policy Questions on Which Members Have Not Reached Agreement." I have copies of those materials if you would like them.

On June 12, I met with McGinnis accompanied by my executive assistant and his, to attend a briefing on case processing presented by members of the staff. The Managing Director for Case Processing led off with a report which included the numbers and types of cases being held in abeyance. He noted among the types of abeyance cases were cases concerning B3 excessive interference.

I asked for a list of cases in abeyance and the issues involved in each case and the associate chief counsel reported at that meeting regarding abeyance cases that there were 35 involving the 7106(b)(3) appropriate arrangements issues.

Here are the lists of materials, memoranda, and here is a memorandum of July 22, 1985, to me and Mr. McGinnis, explaining which cases were in abeyance and so on. I will be glad to provide this for the record.¹⁶

Senator EAGLETON. I ask that all of those materials be placed in the record.

Senator STEVENS. Without objection.

¹⁶ See p. 171.

I understand Mr. McGinnis came to the agency as a recess appointment in the period prior to the convening of Congress in 1985. Is that right, he came on board before January 1, 1985?

Mr. FRAZIER. Yes, sir.

Senator STEVENS. And you are telling us that in June 1985 you and the staff notified Mr. McGinnis that there had been a series of cases that had not been submitted to him. Is that right?

Mr. FRAZIER. No, sir. In January 1985 he was presented with source books with tabs, with these lists of cases in them. This material was prepared so that he would know exactly what the situation was when he came on board. These are presented to him in January.

Senator STEVENS. Mr. McGinnis replaced Mr. Haughton, right?

Mr. FRAZIER. He followed Mr. Haughton. Yes, sir.

Senator STEVENS. Had Mr. Haughton agreed with you on the segregation of those cases?

Mr. FRAZIER. He was aware that we had a number of cases in abeyance. Yes, sir.

Senator STEVENS. I didn't ask you that. I said did he concur in holding those cases in abeyance?

Mr. FRAZIER. Well, some of these weren't. It depends on which cases you are talking about. If we are talking about all 89, I cannot say whether he concurred on all 89 or not.

Senator STEVENS. Did you make the decision to hold them in abeyance?

Mr. FRAZIER. I worked with Mr. Haughton to put some cases in abeyance. When Mr. McGinnis came on board, those were the cases that were in abeyance, cases that presented like issues on the same types of issues. The staff then added to the list, because they dealt with the same basic issues.

Senator STEVENS. I think one of the most disturbing things in this record, to me, is that it appears that you have a unitary staff that is responsible primarily to the chairman. Is that correct?

Mr. FRAZIER. No, sir.

Senator STEVENS. Who are they responsible to?

Mr. FRAZIER. All three members. The staff of the Authority on the administrative side is responsible only to the chairman because he is the chief executive and administrative officer of the agency under the provisions of our laws.

However, on the case handling side——

Senator STEVENS. The director of case management, is he administrative?

Mr. FRAZIER. No, sir. On the case management side, the case staff responds to all three members, and their concerns on a case. Thus, for example, the staff usually drafts a proposed decision and submits it to the members.

Senator STEVENS. You came to this from the GAO.

Mr. FRAZIER. Yes, sir.

Senator STEVENS. During the fiscal year 1985, the Authority closed 822 cases, the highest number in any fiscal year in the agency's history? However, of the 449 cases in the tracking system as of August 22, 1985, 127 or 25 percent were in abeyance because of lack of a third member. These cases were in three general categories.

Fifteen cases held because of a tie vote between the two Authority members and needing a third member to cast the deciding vote. Twenty-three not forwarded to the members because of earlier tied votes in similar cases. Eighty-nine cases not forwarded to members because they involved issues the acting chairman and the director of case management believes so important that they required the attention of three Authority members. Those are the 89 cases that Mr. McGinnis told the GAO that he was unaware had been held in abeyance and he believed should not have been delayed.

My question to you is this. Do you and the director of case management assume that once there has been a tie vote that there will always be a tie vote on a particular type of case?

Mr. FRAZIER. Until a member indicates that he has changed his vote on that issue. Yes, sir.

Senator STEVENS. How does he indicate that unless he has a case put in front of him?

Mr. FRAZIER. If a case is put before a member on a given issue, and a member votes one way and the other member votes the other, the staff then assumes that until they hear from one of the members that his vote has changed, there is no point in continuing to process the same issue to the members to get another indication that there is a tie vote.

They try to go to the cases in which they believe they can find agreement between the two members, when we had only two members, in order to get out more cases.

Senator STEVENS. The GAO report indicates that you and the director for case management held back 127 cases because the 2 of you felt that Mr. McGinnis would decide similar cases in the way of prior cases, and you made that decision. He did not even know it.

Mr. FRAZIER. I have got evidence here to show that it was made known to him in January 1985.

Senator STEVENS. In January he had not decided any cases.

Mr. FRAZIER. These source books were before him, Senator. He knew precisely—

Senator STEVENS. Mr. Frazier, I just asked you, if he had not decided any cases, how could you decide that because of earlier tie votes he would decide the case in one way or another?

Mr. FRAZIER. No. No, sir. The tie vote that was cited in that report referred to cases that are tie votes between me and Mr. McGinnis.

Senator STEVENS. What about these cases where you and the director of case management decided they were so important that they required three members.

Mr. FRAZIER. Those were cases that we decided, when Mr. Haughton was leaving, before Mr. McGinnis took the oath of office, that because I was an acting chairman and was in essentially a caretaker role in the agency that it would be preferable for the new chairman to be on board before we acted on those cases.

When Member McGinnis came on board, he was made aware of those cases that were in abeyance for that reason. He didn't ask that they be taken out of abeyance and be processed. He was constantly kept informed. That was in the briefing books. We had a briefing on it in June 1985. In an enclosure to a letter that he, him-

self, wrote, he stated that there are 46 other cases which are being held in abeyance for various reasons over and above those that involved tie votes.

So he was aware of all of this, regardless of what he says. The reason these cases didn't get out was because of the constant change in membership, the fact that I was the Acting Chairman. We had a recess appointee. We had a holdover member. He left and the Agency got a recess appointee. As you have that constant fluctuation in membership, finding a method of ensuring that everyone is as well informed on every case is a difficult matter. That is why we prepared these briefing books for Member McGinnis when he came on board, so that he could come up to snuff on the status of all the cases and all of the issues before the Authority as quickly as possible.

So that he would know, hopefully, as much as his predecessor knew about the status of cases.

Senator STEVENS. Let me ask you another thing. This is also from the GAO report. They are discussing the Authority cases that were in abeyance due to a lack of third member on August 22, 1985. The cases ranged in age from 160 to 1,241 days since being received at the national headquarters, with an average of 940 days since step 1 and 46 days since advancing to the most recent step.

The cases not forwarded to members because of a tie vote in a similar case were all negotiability cases except for one arbitration case, and most involving the pay and money related fringe benefits issues. They ranged in age from 162 to 1,694 days since step 1, with an average of 893 days since the case was received and 155 since the most recent step.

That means an average of more than 2½ years, with some of them having been in headquarters almost 5 years, involving fringe benefits and pay.

Mr. FRAZIER. Yes, sir.

Senator STEVENS. The court of appeals said that the procedure is often a sham due to long delays in FLRA case proceedings. It also said the decision by the Authority may be delayed some 3 years by backlog from which that agency suffers. It said long delays from Authority's decisionmaking is not uncommon. The court has repeatedly chastised the FLRA for its delays in deciding cases.

It also noted the inordinate delay in the Authority's handling of this one proceeding in this particular appeal, which is the National Association of Government Employees appeal. In another one they said, "we also find FLRA's lack of timeliness extremely disturbing. It took 15 months for the agency to issue a brief decision."

In another one they say the FLRA took nearly 2 years to decide a relatively simple case. Even more unfortunate, it appears the delay in the case was not unusual. Clearly, this is not what the Congress envisioned and it does not fulfill the Authority's responsibility for carrying out the purpose in title 7 of the Civil Service Reform Act. We can only admonish the Authority as strongly as possible to improve its sad performance.

During that whole period of time that they were talking about, you were the Acting Chairman.

Mr. FRAZIER. Not that whole period of time, Senator.

Senator STEVENS. I am talking about 1984 and 1985. I think I only read 1984. No there is one 1982. All the rest were 1984 and 1985 decisions.

Mr. FRAZIER. If those cases were decided in 1984 and 1985, if they were that old, they came in long before I became the Acting Chairman. I became the Acting Chairman in September 1984. I don't know what cases precisely you are referring to, but if a case is—

Senator STEVENS. They are all the cases mentioned in this most recent decision. The AFGE case against the FLRA was decided in May 1986, argued April 9.

Mr. FRAZIER. Yes, sir.

Senator STEVENS. And it pertains to allegations concerning 1985. Weren't you Chairman in 1985?

Mr. FRAZIER. Yes, sir. What I am saying is that these cases weren't necessarily filed with the Authority when I was the Acting Chairman if they were issued during the period when I was the Acting Chairman. If they were that old they were likely filed before then.

I would like to, if I may, address again this problem of case delays and try to clarify the causes and what I did while I was the Acting Chairman.

Senator STEVENS. Are you aware of any of the court of appeals decisions, prior to the time when you became chairman, which took this general line about the inordinate delay of the FLRA?

Mr. FRAZIER. Absolutely.

Senator STEVENS. After you became Chairman, what did you do to reduce the backlog?

Mr. FRAZIER. I will be happy to tell you what I did to reduce the backlog. When I became the Acting Chairman, in September 1984, we had a large case backlog. I sat down with then Member Haughton, who was a holdover member and the only other member, and I suggested to him that the only thing we could do, although I was an Acting Chairman and he was a holdover member, was to concentrate on getting as many cases out as possible that he and I could agree on before he was replaced. We knew as a holdover member the administration was working actively to replace him, and I had been told that by the White House Personnel Office when I was made Acting Chairman.

He and I worked diligently to do that. We closed 211 cases in the first quarter of fiscal year 1985, which was the largest number that the Authority had ever closed in any first quarter of any year.

When Member McGinnis came on board in December, there was a hiatus, of course, as you might expect when a new member comes on board. He is not anxious to decide cases immediately. It took several weeks or a couple of months before he felt comfortable with the process. He and I had talked about trying to get out as many decisions as we could, even though Haughton had gone, he was a recess appointee and I was still the Acting Chairman.

We did just that, we concluded that year, by closing 822 cases, which was the largest number ever closed by the Authority, whether we had a Chairman or an Acting Chairman, in the history of the Agency. The previous year, we closed 750, and that was 100 more than any previous year, when we had a Chairman and even three members. This year, we closed 822 with two members, an Acting

Chairman and a recess appointee, and that was the only time that I had any real responsibility of exercising leadership as an Acting Chairman to provide leadership to close cases.

We reduced our case backlog to 460 cases, so that when Chairman Calhoun came on board, we had the lowest number of cases that we had had on hand since the close of any fiscal year, excepting our very first year of operation. I think under the circumstances, I frankly did the best I could to get cases out and reduce the backlog.

I think the GAO recognized that in the reports that you referred to. They cite the number of cases we closed. They point out that it is the largest number in our history. They point out that it is the smallest backlog for years.

The court of appeals, when they denied the last request for mandamus from AGFE, they pointed out that we had closed 822 cases in the previous fiscal year, the largest number in our history.

This is what I did while I was the Acting Chairman to try to reduce the case backlog.

Senator STEVENS. Have you changed the arbitrary 16-step procedure for the tracking system as far as the FLRA is concerned?

Mr. FRAZIER. Sir, there is a great deal of misunderstanding about that so-called 15-step procedure.

Senator STEVENS. They say that it is 16. Is it 15 or 16?

Mr. FRAZIER. The so-called 16-step procedure because I think, and I have a document here that I would be happy to be introduced for the record, which describes each step in that procedure. It includes a form that the FLRA uses with respect to our cases. Those are not 16 substantive steps during which the case is being considered. For example, the first so-called step is the date on which the case is filed, the date that it comes in the mail. We have a form, and we enter the date on which the case is received. The next date, I believe, is the date on which all of the documents are in, and the case is ready for processing.

These are nothing more than timeframes so that we can keep track of the status of a case, so that we know where it is, when it is ready for processing. For example, the next step, after all of the papers are in, is a procedural review is made of the case. This is the first substantive action that is taken.

A procedural review is made to make sure that all of the filings comport with our rules. If not, for example, if the case is filed untimely, we can close the case at that so-called step by denying any further consideration of it as being untimely.

If, on the other hand, the procedural review indicates that the case is ready for processing, then it moves on to an assignment, to an attorney to begin working on it.

We have, in the so-called 16-step procedure, alternate steps. For example, after procedural review, if it is then identified as a case that can be decided on the basis of precedent, it goes on an expedited track, which would be, I think, that so-called step No. 4. If, on the other hand, it can't be expedited because there is no binding precedent on the issue, it presents something new, we skip No. 4 and it goes to No. 5, where it is assigned to an attorney to do the research and start preparing the decision.

This so-called 16-step procedure is a case tracking system with dates so that we can keep track of how long it has been at a certain step, when something is ready for filing, how long an attorney has had it, how long a supervisor has had it.

In terms of substantive review of decisions, under the existing 16-step procedure, there are only three substantive reviews of the work of the attorneys. We have now reduced that in an effort to move cases even faster, so that we set up some fast track systems to try to get out more cases with less review.

I would be happy, as I said, to present this information for the record on the so-called 16-step or 15-step procedure, whatever it is referred to as, but there is a great deal of misunderstanding.¹⁷

Senator STEVENS. The court of appeals has criticized the inordinate delays in that procedure.

Mr. FRAZIER. They have criticized inordinate delay in the processing of cases at the Authority.

Senator STEVENS. This is a procedure that has been handled in that old continuum of the criticism, is it not? It has been the same procedure for as long as you have been there, hasn't it?

Mr. FRAZIER. No, sir.

Senator STEVENS. Have you changed it?

Mr. FRAZIER. We have constantly. The members have constantly reviewed and changed. The Executive Director of the agency, who is closer to the details of managing the staff on a day-to-day basis, and keeping track of individual cases, the members don't do that themselves, and various executive directors have changed the case processing procedures over the years.

At one point in time, we had a so-called procedure that had far more than the so-called 16 steps. Again, they weren't substantive steps that took time.

Senator STEVENS. My question to you is, have you during your tenure as Acting Chairman changed the procedure in handling these cases?

Mr. FRAZIER. Yes, sir.

Senator STEVENS. Tell us how you have changed the procedure.

Mr. FRAZIER. I did not change the 15-step procedure because, again, that was in place and it had been put in place by Chairman Mahone. When I was the Acting Chairman, it was clear to me that I was the caretaker and administrator of the agency, and I was told that I would be in that role for only a short period of time. I concluded that I should not make any significant changes in that procedure or any other substantive method of operation before the new Chairman came on board, because the new Chairman would then feel that I was trying to change things in midstream in a caretaker capacity between the two Chairmen.

However, while I was the Acting Chairman, we attempted to set up procedures, ad hoc procedures, to expedite cases, and that is how we got out the record number of 822 cases during that fiscal year. It was by insisting that we expedite more cases, that we use more short-form decisions, that we have less supervisory review, that supervisors participate at the initial assignment stage, rather

¹⁷ See p. 162.

than reviewing the draft of the attorney. In other words, speeding up the process, and that is what I concentrated on without changing any formal procedure that was in place at the time.

Senator STEVENS. Let me read this to you. "In the period immediately preceding Mr. Frazier's appointment as Acting Chairman, the Authority upheld its ALJ's in 79 percent of the decisions. Similarly, arbitrators were upheld 66 percent of the time." This is based on statistics in volume 16, it says here in the statement.

By volume 19, Acting Chairman Frazier had turned these numbers upside down. A review of the decisions showed that he personally voted to reverse ALJ decisions 73 percent of the time, and arbitrators 87 percent of the time.

Is that statement true?

Mr. FRAZIER. I can say categorically that the part about the arbitration is not. I have not computed any figures on the administrative law judge statistics, and I would have to do that.

Senator STEVENS. I will ask you, for the record, to submit your response to the statement that says, "A review of the decisions showed he personally voted to reverse ALJ decisions 73 percent of the time, and arbitrators, 87 percent of the time."¹⁸

Mr. FRAZIER. I will be happy to do that.

Senator STEVENS. I am sorry to hold up Senator Glenn, this is my last question.

Senator GLENN. Thank you, Mr. Chairman.

I am sorry that I could not be here yesterday, and I had other conflicts today. We have too many things that we are involved with here.

I think that what you have been getting at, though, I would like to follow up just briefly. Then I have several other questions for the record, and I will submit them for the record.¹⁹

What is the average length of time from filing to decision, do you have a figure on that?

Mr. FRAZIER. I don't have one readily available at hand, but it varies with the type of case.

Senator GLENN. Can you give us an average just off the top of your head, and I won't pin you to it? You can give us a real answer on it later, but is it 1 year, 2 years, 5 years, or what is the period?

Mr. FRAZIER. I might refer to the GAO report as some indication at that time of the age of cases. I think that that is the most accurate measurement. For example, let's take unfair labor practice cases, which were pending before the Authority on the date of this report, for fiscal year 1985, which would have been at the end of the fiscal year, we had 59 that were one to 180 days, 36 that were 180 to 360, 23 that were 361 to 540, 14 that were 541 to 720, and 16 that were 721 plus. The median age, based on my calculation of the 148 cases there, would fall somewhere between 180 to 360 days. It would fall in that range as the median age of an unfair labor practice case, and that is determined from the date the case was transmitted to the Authority.

Senator GLENN. Do you have any idea how this compares with NLRB, are they similar, or would they get more expeditious action?

¹⁸ See p. 168.

¹⁹ See p. 219.

It seems to me that when people file a case, and they are looking for immediate action, that should be a real priority. I know that you said you ground out 822 cases in 1 fiscal year, and you had 460 still left. What do you need? Do you need more help, or do you need more staff? What is the delay?

Mr. FRAZIER. Senator, I think there is a number of causes of delay at the Authority. The problem arose when we were initially established and developed a big backlog right up front in the first couple of years of our operation. Then in fiscal year 1982, we had a significant reduction in resources, and we had to run a reduction in force that affected about a quarter of our people, creating a lot of turmoil in the agency.

We have had to work out from 1982 until now that backlog of cases. Once we get the older cases out, then I think the agency is in a position, at the members level and at the staff of the Authority, to process a case in a timely fashion without undue delays. What I mean by that is so someone is working on a case at all times, so cases are not sitting on the shelf awaiting to be assigned because we have too many cases for assignment.

I would be more than happy, and I am sure that the Chairman of our agency would be, to work with the staff of this committee to explore ways in which we could improve the efficiencies of our operation.

Senator GLENN. What I would like and I don't want to get into too much of a partisan wrangle here, but I wonder, with some of the testimony that I reviewed with my staff that was here yesterday, if this was one of the agencies that the administration is sort of marking for eventual extinction by lack of support, perhaps.

I don't know if that is the case or not the case, but I certainly wondered that because when you have backlogs on the order of 822, or 460, or something like that, and people are out there filing, it would seem to me that we should be able to set up a system. If we need this system, fine, let's make the thing work, and work a lot more timely than it is right now.

Senator STEVENS. Would the Senator yield right there?

Senator GLENN. Yes.

Senator STEVENS. I think the problem developed when Mr. McGinnis got a recess appointment. If you will recall, a policy position was taken against confirming recess appointments that were made in the period following the adjournment in 1984 and the commencement of Congress in January 1985. He was never confirmed.

As a consequence, there wasn't a nomination for the subsequent vacancy. There was a delay involved in that. I think that there is a lot of blame that can be shared by a lot of people as far as the problem about the members of the FLRA are concerned.

I can't understand the fact that Mr. Frazier has been there the whole time. If there is anyone, he ought to have had the total spectrum envisioned concerning the failure of the agency. From 1979 until now, Mr. Frazier has been there, as I gather. While he is to be commended for getting rid of some cases in 1985, it doesn't explain the whole period of his service on the FLRA in terms of trying to find some way to deal with this.

I don't know if the Senator is familiar with the most recent decision of the court of appeals, but it is continual criticism of this agency's activities.

Senator GLENN. Mr. Chairman, I would like to submit three questions for the record, and have Mr. Frazier answer these in writing for the record.²⁰ They involve some of these things on leadership and direction, and how he feels that should be approached, which I think is key.

A second question involves the courts, and some of the things they have said. There are some questions involving that which I think also is key.

The third one is in this area of meeting the standards and the mandate of FLRA as far as programs to set this union-management relationship.

I think that these three areas really go to the heart of the matter. I would like to submit them, and ask for the answers in writing. I don't know what the Chair's plan is for mark-up or for final vote on this, but I would hope that we might have a time period here before that is required, so that we can get the written answers back, so that all members could have the benefit of the replies on it.

Senator STEVENS. I am happy to do that. I have asked Mr. Frazier for information for the committee also. Does the Senator have any timeframe within which he would like to have those? Would 2 weeks do it?

Senator GLENN. That would be fine.

Senator STEVENS. Mr. Frazier, could you have those responses to us by 2 weeks from today?

Mr. FRAZIER. Yes, sir, sooner than that, I am sure.

Senator GLENN. That would be fine with me.

Senator STEVENS. We will ask you to respond to the questions that Senator Glenn submitted, and the one that I asked you, by 2 weeks from today. If you have any problem about that, notify us and we will be happy to give you additional time.

Mr. FRAZIER. Mr. Chairman, could I comment on your last remark?

Senator STEVENS. Senator Glenn has the time.

Senator GLENN. Just let me finish because I have to get going here, and then you may make any comment you like.

I would implore you, please, don't just sit over there under OMB and all these folks who have the long knives out for everything, for every government program. We just can't see this whole thing with Government employees be backed up, backed up, and backed up, without giving support.

We want the answers to the questions here, and then we will make decisions based on your specific case here. But I think that if the people over there at the FLRA need help, tell us.

Mr. FRAZIER. Yes, sir.

Senator GLENN. If OMB is getting to you, and Gramm-Rudman is getting to you, let us know. If you can't do the job with the resources you have over there, tell us. We want to work in partner-

²⁰ See p. 219.

ship, and we want to see these things work. We are the committee that has oversight on this thing. We don't want to see the agency languish in the future with caseloads building up close to 1,000 that you process one year. I just think that it is unfair to the people filing cases. They want to be dealt with fairly. You want to deal with them fairly, and you need the resources to do that.

This doesn't mean that I am inviting you to goldplate the agency, or goldplate FLRA, or anything else. I, for one, am getting a little sick and tired of Government agencies around here coming up before us and they say, we don't have the people, we don't have this, we don't have that. Maybe we ought to do away with FLRA, and put it back under NLRB, and make a branch there, or something. Maybe that would be the absolutely wrong idea.

I am getting a little tired of hearing one agency after another come up here, saying we have been whacked, and we have been cut, and we can't do this. Meanwhile, the people filing suits are out there, and they have problems, and they want to see the things answered and corrected in a timely fashion. Timeliness to me is a very key element in government. When people want a response out of their Government and they can't get it for years and years and years on end, it is no government at all, really, that is helping them, it is just putting them in limbo. You might as well sail papers off into the Grand Canyon, or something, and wait for them to come back up again.

If you need help, let us know. I will submit the three questions, and I think that the timeframe that the chairman suggested here is excellent as far as I am concerned. I am just sorry that I couldn't be here all day.

Senator STEVENS. Let me say this to the Senator, if I find any evidence that the administration has tried in any way to throttle this agency, I will be right beside you. It is a creation of this committee, I don't know if people realize this.

Senator EAGLETON. I will give you a little evidence in a minute.

Senator STEVENS. The other nominee before us was Senator Javits' AA at the time that it was created. So there isn't any evidence that the administration is trying to destroy it. They selected a woman who advised Senator Javits at the time we created it.

As a matter of fact, the delay that we are talking about is all pre-Gramm-Rudman-Hollings. That ought to scare you, because we have had this inordinate delay with ample funding. Now they are going to be hit, as all agencies are, by Gramm-Rudman-Hollings. I really think that it is important for us to look into the cause of the delay, and we intend to do this.

I have asked for some statistics, to follow up the Senator's comments, concerning the number of times a delay that has been encountered in the NLRB process, the number of times the NLRB has been taken to court, and the number of times the NLRB has been reversed. Similar comments have been made regarding the FLRA in connection with the same court of appeals. I think that it would be indicative, as we review this request for reappointment.

Senator GLENN. I asked about the timeframe of cases before it. I don't know whether you have available to you NLRB figures on this, but I think that you could probably get them.

Senator STEVENS. We have asked the staff to get those.²¹

Senator GLENN. The average times.

Senator STEVENS. Yes.

Senator GLENN. Good.

Senator STEVENS. We will present to the committee the timeframes for decision by this agency and the timeframes for decisions by NLRB, the number of times this agency has been taken to court, the number of times the NLRB has been taken to court.

I have asked Mr. Frazier to give us the specific response to the statement made by Mr. Tobias concerning his personal votes in reversing ALJ's and the arbitrators.

Senator GLENN. Thank you. I appreciate particularly Senator Eagleton letting me go ahead here because I do have another commitment. Thank you very much.

Senator EAGLETON. I will be brief, Mr. Chairman.

What this boils down to is, in essence, a period of time that Mr. Frazier served as Acting Chairman, that is the primary focus really of this hearing, and it is the primary focus of the GAO report. It is the primary focus of the court opinions.

There have been delays out of FLRA, and Mr. Frazier acknowledges that they are having them. Although simultaneously with the delays, interestingly enough, during this period which is really fiscal year 1985, there were some old cases during that period, they set a record in closing 822 cases during that period.

I am enamored of my little chart. It is precisely during that period, fiscal year 1985, when Mr. Frazier is virtually operating alone at FLRA.

You asked about the administration's role in this, and whether they were trying to kill it or not. They permitted a vacancy, after Ms. Mahone went off, she had been the Chairman, in September 1984.

Mr. FRAZIER. Yes, sir.

Senator EAGLETON. They did not fill it with Mr. Calhoun until December 1985. That is 1 year and 2 months when there is that vacancy.

Also during that year and 2 months, Mr. McGinnis comes on as a recess appointment. Recess appointments, as we all know in this town, as insiders within the Beltway, are suspicious. Having examined the McGinnis record, and I am the one that held up Mr. McGinnis and I am proud of it—I will be glad to talk to Senator Stevens any time about what Mr. Frazier said, and about what Mr. McGinnis said, and I will come down on the side of what Mr. Frazier said, because I can show you the record.

McGinnis couldn't stand the test of a confirmation, but he got this recess appointment. He comes on, and he doesn't know beans about the FLRA. So there is Frazier sitting there by himself. McGinnis isn't ready to start ruling and deciding and writing opinions, and acting like a judge, because he doesn't know a thing of what is going on. There is this vacancy for 1 year and 2 months, so it is a one-person Acting Chairman, who knows that he is only

²¹ The material requested from the NLRB and FLRA may be found on p. 168.

acting. He knows that he isn't the Chairman, he is just in a temporary holding pattern.

As Senator Stevens said, Mr. Frazier was there the whole time, that is true. So Mr. Frazier is going to get the whole blame. He is going to get the total dump job. McGinnis isn't around to gripe about it because his recess appointment ran out. The vacancy was ultimately filled 1 year and 2 months later by Calhoun. Now, just this morning earlier, we are finally going to get a third person, a very good member, and this is Miss McKee.

Yet during that lonesome period, where he is virtually operating alone, he sets a record in cases disposed of. It doesn't mean that they couldn't dispose of more, but at least he set a record when he is operating alone.

Now let me ask you this question. Mr. Calhoun is the functioning Chairman in this agency?

Mr. FRAZIER. Yes, sir.

Senator EAGLETON. He has been on the job for a few months.

From what you know of Miss McKee, she is a very bright and talented person.

Mr. FRAZIER. Yes, sir.

Senator EAGLETON. You have experience in these matters, and you have been on this Board for lots of years. When all three members are functioning and operating, would it be your expectation that you can more quickly dispose of cases in the years ahead than you have been able to in prior years when you have had either one member, or one-and-a-half members, or one member and a recess appointee, or whatever concoction the FLRA was operating in?

Would it be your estimate that with three full-time, confirmed, knowledgeable and experienced functioning members, you will be able to dispose of cases more quickly?

Mr. FRAZIER. I am firmly convinced of it.

I think that that would put an end to the turmoil and the change over in membership that has taken place throughout the history of the agency.

We have had five different combinations of people sitting there at various times. As you say, we have had holdovers, recess appointees, Acting Chairman, and so on, and lots of vacancies. It does not create stability. It does not create an environment in which you can provide for consistency or continuity. It certainly doesn't create an environment in which we can move cases.

If the actors change so frequently in any agency that is collegial in nature, it takes time for a new member to become acquainted with what is going on. But once they have been there, after they have been there a while, they get to know one another, they get to work with one another well, and the cases move much faster.

Senator EAGLETON. My last question.

During what I call the critical year, calendar 1985, there is a long vacancy, you are Acting Chairman, McGinnis is there as a recess appointee. Didn't I hear you say that he came on around December 1984?

Mr. FRAZIER. Yes.

Senator EAGLETON. The Congress has to go out on recess for the President to do one of those sneaky, sneaky recess appointments.

Mr. FRAZIER. He came on in December 1984.

Senator EAGLETON. That is when Presidents do their great recess work, that is when they unload people that they can't otherwise get confirmed for whatever job. It is an awful practice that shouldn't be engaged in, except when they appoint my friend.

Anyway, as you said, didn't it take some warm up time for Mr. McGinnis to start cranking out some opinions?

Mr. FRAZIER. Absolutely.

Senator EAGLETON. Was he an attorney trained in FLRA law?

Mr. FRAZIER. No.

Senator EAGLETON. Had he served in any kind of judicial capacity?

Mr. FRAZIER. To the best of my knowledge, he had not. He served as a labor consultant.

Senator EAGLETON. You function in a quasi-legal capacity in that job.

Mr. FRAZIER. That is correct.

Senator EAGLETON. For a lay person to come on and start cranking out opinions—did you sign your name to the opinions?

Mr. FRAZIER. Yes, sir.

Senator EAGLETON. Do you sign on the dissents?

Mr. FRAZIER. Our signature appears on the decisions and on the dissents, and on the concurrences.

Senator EAGLETON. It is signed, Frazier, what, Commissioner?

Mr. FRAZIER. Member.

Senator EAGLETON. So before McGinnis could be a judge, Judge McGinnis, this recess member, he had to instantly learn some FLRA law; right?

Mr. FRAZIER. Right.

Senator EAGLETON. So he wasn't of much help for a period of time, was he, while you were there alone?

Mr. FRAZIER. It took him a while to become acquainted with what our staff was doing.

Senator EAGLETON. Despite all of that, you set a record. You disposed of a record number of cases during that period.

Mr. FRAZIER. Yes.

Senator EAGLETON. I have no further questions.

Senator STEVENS. We look forward to your responses. We are not going to close this hearing; we may have further days of hearing.

Thank you very much.

[Whereupon, at 11:45 a.m., the committee adjourned, to reconvene at the call of the Chair.]

PREPARED STATEMENT OF SENATOR WARNER

ADDITIONAL MATERIAL SUBMITTED FOR THE RECORD

Mr. Chairman, I am doubly privileged to come before the committee this morning to introduce two of my valued constituents.

In order of consideration, I would first like to share some remarks on Daniel R. Levinson, the President's appointment to be Chairman of the Merit Systems Protection Board.

I believe you will find him highly qualified to fill this important Federal post.

The Merit Systems Protection Board, as established by the Civil Service Reform Act of 1978, is the watchdog of civilian service in the Federal Government.

The Chairman must be a person well versed and skilled in assuring that the rights of Federal employees are protected while, at the same time, maintaining the vested interest of American taxpayers in providing responsible government.

This is a big job, requiring detailed experience and accurate judgment.

Dan Levinson's outstanding record with the law and public service makes him an ideal choice.

Currently serving as General Counsel of the Consumer Product Safety Commission, Dan has acted as Deputy General Counsel at OPM, was made partner of a prestigious Washington law firm at age 33, has served as an educator and author, and is a Phi Beta Kappa graduate.

The Government is fortunate indeed to have a person of these credentials wishing to continue and pursue a leadership role in the Federal civil service.

Dan and his wife, Luna, make their home in Falls Church, VA where, I understand, the pressing demands of an infant daughter, Luna Claire, have required Mrs. Levinson's presence.

I certainly understand that priority and look forward to a Senate visit by Mrs. Levinson at a later date.

Mr. Chairman, with further regard to Mr. Levinson, I have a statement urging his approval by my colleague from Virginia, Senator Tribble.

I ask unanimous consent that it be included as a part of the hearing record.

Furthermore, I join Senator Tribble in asking the committee for its most favorable consideration.

On your panel today, you will be considering another key appointment in the infrastructure of the Federal Government, that of Henry B. Frazier III, for a new term on the Federal Labor Relations Authority.

Mr. Frazier has served as a member of the Federal Labor Relations Authority [FLRA] since its establishment under the Civil Service Reform Act of 1978.

The institutional memory he brings to FLRA is invaluable, providing stability and continuity to an essential Federal agency.

By mandate, the FLRA must provide direction and guidance in the development of Federal service labor-management relations.

If the Government is to maintain a productive rapport with Federal employee labor organizations, it is critical that FLRA be viewed with the highest credibility as an arbiter of both employee and agency statutory rights and obligations.

With this mission in mind, it would be difficult indeed to find a more qualified candidate than Mr. Frazier.

Through a distinguished career in Federal civilian service, he has been honored for his abilities by the Department of the Army, the Office of Management and Budget, the Secretary of Labor, and the forerunner of OPM, the Civil Service Commission.

Mr. Frazier, who resides with his wife, Joan, in Alexandria, VA, is a fellow alumnus of the University of Virginia, where he continues to play an active role as national president of the alumni association.

He has spent a distinguished legal career in Federal service, and it is with great confidence in his abilities that I commend him to the committee for a new term as member of the Federal Labor Relations Authority.

Mr. Chairman, I am joined in this effort by a letter of support from my Virginia colleague, D. French Slaughter, Jr., of Virginia's Seventh Congressional District.

I ask unanimous consent that Mr. Slaughter's letter be added at an appropriate point in the record of today's proceedings.

Please accept my thanks for the opportunity to appear before you today, and whatever actions you may take to speed these two outstanding appointments to full confirmation.

D. FRENCH SLAUGHTER, JR.
7th District, Virginia

COMMITTEES:
SCIENCE AND TECHNOLOGY
SMALL BUSINESS

WASHINGTON OFFICE
310 CARMON HOUSE OFFICE BUILDING
TELEPHONE: (202) 225-0551

Congress of the United States
House of Representatives
Washington, DC 20515

April 8, 1986

The Honorable John W. Warner
United States Senate
Washington, D.C. 20510

Dear John:

Just a line to encourage you to write to Senator Roth in connection with the President's nomination of Henry B. Frazier, III, for a new term on the Federal Labor Relations Authority. I understand this will come before the Governmental Affairs Committee.

I am enclosing a copy of his resume. I have known him for a number of years through his work with the Alumni Association of the University of Virginia. Henry served as President of the Association for the past year and he has been active in the affairs of the Association for many years.

I believe that Henry Frazier certainly qualifies and deserves the appointment.

Thank you for your consideration.

Sincerely,

D. French Slaughter, Jr.
D. French Slaughter, Jr.

DFS/am

PLEASE REPLY TO:

- ☐ OFFICES IN THE 7TH DISTRICT:
100 COURT SQUARE ANNEX
(P.O. Box 138)
CHARLOTTESVILLE, VA 22902
TELEPHONE: (804) 295-2108
- ☐ 110 SOUTH VINEY STREET
(P.O. Box 1076)
CHARLOTTESVILLE, VA 22901
(703) 825-3485
- ☐ SUITE 301, 904 PRINCCESS AVE STREET
(P.O. Box 335)
FARMINGDALE, VA 22404
TELEPHONE: (703) 273-0538
- ☐ 112 NORTH CARPSON STREET
(P.O. Box 714)
WASHINGTON, VA 22001
TELEPHONE: (703) 887-0888

PREPARED STATEMENT OF SENATOR TRIBLE

Mr. Chairman, I am pleased to present to the committee Daniel Levinson for confirmation as the Chairman of the Merit Systems Protection Board.

The MSPB is charged with the important responsibility of maintaining the integrity of the Government's merit systems and ensuring that Federal workers are treated fairly under them. Dan Levinson is eminently qualified to lead the MSPB in this role.

Dan has a long record of experience in employee relations and the Federal civil service system. He has substantial experience in administrative law, working with a U.S. administrative law judge, practicing employee relations law in the private sector, and serving as General Counsel for the Office of Personnel Management. In addition, Dan has published several works on employee relations and has taught employee relations law at the post-graduate level.

Dan's "hands on" experience working for the Federal Government coupled with his extensive knowledge of employee relations law makes Dan Levinson the perfect choice to chair the MSPB. I urge the committee to report his nomination promptly.

PREPARED STATEMENT OF SENATOR WARNER

Mr. Chairman, it was not my intention to paper your committee with statements today, but I cannot let the opportunity pass to share some brief remarks in behalf of Jean McKee.

This outstanding woman comes before you with a 30-year career in government and political service. My path crossed with Jean McKee when I had the good fortune to have her as my deputy at the American Bicentennial Administration. The expertise and professionalism she brought to countless management and administration decisions made her a truly invaluable commodity.

The committee should also be made aware that Jean is a veteran of the legislative branch, having served over a 10-year period as special assistant and administrative assistant to our late departed and esteemed colleague, Senator Jacob Javits. The vagaries of the legislative process hold no mystery for Jean McKee.

President Reagan has nominated Jean to serve as a new member of the Federal Labor Relations Authority (FLRA), a position for which she is imminently qualified. Her work of the last 3 years has been as Executive Director of the Federal Mediation and Conciliation Service. She will bring to the FLRA a working knowledge of current labor relation precedents and procedures.

Mr. Chairman, I am confident that this appointment will merit your approval. The best thing we can do is speed her confirmation to the Senate floor so she can take up her duties at the FLRA. Thank you for your support and for allowing me to put in a few good words for Jean, a good friend and trusted working partner.

BIOGRAPHICAL AND FINANCIAL INFORMATION REQUESTED OF NOMINEES

A. BIOGRAPHICAL INFORMATION

1. **Name:** (Include any former names used.)
2. **Position to which nominated:**
3. **Date of nomination:**
4. **Address:** (List current place of residence and office addresses.)
5. **Date and place of birth:**
6. **Marital status:** (Include maiden name of wife or husband's name.)
7. **Names and ages of children:**
8. **Education:** List secondary and higher education institutions, dates attended, degree received and date degree granted.
9. **Employment record:** List all jobs held since college, including the title or description of job, name of employer, location of work, and dates of employment.
10. **Government experience:** List any advisory, consultative, honorary or other part-time service or positions with Federal, State, or local governments, other than those listed above.
11. **Business relationships:** List all positions held as an officer, director, trustee, partner, proprietor, agent, representative, or consultant of any corporation, company, firm, partnership, or other business enterprise, educational or other institution.
12. **Memberships:** List all memberships and offices held in professional, fraternal, scholarly, civic, business, charitable and other organizations.
13. **Political affiliations and activities:**
 - (a) List all offices with a political party which you have held or any public office for which you have been a candidate.
 - (b) List all memberships and offices held in and services rendered to all political parties or election committees during the last 10 years.
 - (c) Itemize all political contributions to any individual, campaign organization, political party, political action committee, or similar entity of \$50 or more for the past 10 years.
14. **Honors and awards:** List all scholarships, fellowships, honorary degrees, honorary society memberships, military medals and any other special recognitions for outstanding service or achievements.
15. **Published writings:** List the titles, publishers, and dates of books, articles, reports, or other published materials which you have written.
16. **Speeches:** Provide the Committee with two copies of any formal speeches you have delivered during the last 5 years which you have copies of and are on topics relevant to the position for which you have been nominated.
17. **Selection:**
 - (a) Do you know why you were chosen for this nomination by the President?
 - (b) What do you believe in your background or employment experience affirmatively qualifies you for this particular appointment?
 - (c) Were any conditions, express or implied, attached to your nomination?
 - (d) Have you made any specific commitments with respect to the basic policies and philosophy which you will follow in the position to which you are nominated? If so, please describe those commitments.

B. FUTURE EMPLOYMENT RELATIONSHIPS

1. Will you sever all connections with your present employers, business firms, business associations or business organizations if you are confirmed by the Senate?
2. Do you have any plans, commitments or agreements to pursue outside employment, with or without compensation, during your service with the government? If so, explain.
3. Do you have any plans, commitments or agreements after completing government service to resume employment, affiliation or practice with your previous employer, business firm, association or organization?

4. Has anybody made a commitment to employ your services in any capacity after you leave government service?
5. If confirmed, do you expect to serve out your full term or until the next Presidential election, whichever is applicable?

C. POTENTIAL CONFLICTS OF INTEREST

1. Describe all financial arrangements, deferred compensation agreements, and other continuing dealings with business associates, clients or customers.
2. Indicate any investments, obligations, liabilities, or other relationships which could involve potential conflicts of interest in the position to which you have been nominated.
3. Describe any business relationship, dealing or financial transaction which you have had during the last 10 years, whether for yourself, on behalf of a client, or acting as an agent that could in any way constitute or result in a possible conflict of interest in the position to which you have been nominated.
4. Describe any activity during the past 10 years in which you have engaged for the purpose of directly or indirectly influencing the passage, defeat or modification of any legislation or affecting the administration and execution of law or public policy.
5. Explain how you will resolve any potential conflict of interest, including any that may be disclosed by your responses to the above items. (Please provide a copy of any trust or other agreements.)
6. Do you agree to have written opinions provided to the Committee by the General Counsel of the agency to which you are nominated and by the Attorney General's office concerning potential conflicts of interest or any legal impediments to your serving in this position?

D. LEGAL MATTERS

1. Have you ever been disciplined or cited for a breach of ethics for unprofessional conduct by, or been the subject of a complaint to any court, administrative agency, professional association, disciplinary committee, or other professional group? If so, provide details.
2. Have you ever been investigated, arrested, charged or held by any Federal, State, or other law enforcement authority for violation of any Federal, State, county or municipal law, regulation or ordinance, other than a minor traffic offense? If so, provide details.
3. Have you or any business of which you are or were an officer ever been involved as a party in interest in any administrative agency proceeding or civil litigation? If so, provide details.
4. Have you ever been convicted (including pleas of guilty or *nolo contendere*) of any criminal violation other than a minor traffic offense?
5. Please advise the Committee of any additional information, favorable or unfavorable, which you feel should be considered in connection with your nomination.

E. FINANCIAL DATA

All information requested under this heading must be provided for yourself, your spouse, and your dependents. (This information will not be published in the record of the hearing on your nomination, but it will be retained in the Committee's files and will be available for public inspection.)

1. Provide a complete and current financial net worth statement which itemizes in detail:
 - (a) The identity and value of all assets held, directly or indirectly, with a value in excess of \$1,000. This itemization should include, but not be limited to, bank accounts, securities, commodities futures, real estate, trusts, investments and other personal property held in a trade or business or for investment. Household furnishings, clothing and automobiles need not be reported.
 - (b) The identity and amount of each liability owed, directly or indirectly, which is in excess of \$1,000. This should include, but not be limited to, debts, mortgages, loans and other financial obligations for which you, your spouse, or your dependents have a direct liability or which may be guaranteed by yourself, your spouse, or your dependents. In identifying each such liability, indicate the nature of the liability, the name of the person owed and the terms of payment.

2. Provide a list of all other liabilities owed, directly or indirectly, having a value in excess of \$1,000 at any time during the last 12 months. Identify the nature of each liability, the amount, and the name of the person owed. Describe the terms of each liability, the security or collateral for each liability, and the current status of the debt repayment.
3. Provide the identity, date, and amount of all transactions, directly or indirectly, in securities, commodities futures, and real estate or other investments, having a value in excess of \$1,000, which have taken place within the last 12 months. For purposes of this paragraph, the identity of individuals or charitable organizations need not be reported but should be indicated.
4. Provide the identity of and a description of the nature of any interest in an option, mineral lease, copyright, or patent held, directly or indirectly, during the past 12 months and indicate which, if any, have been divested and the date of divestment.
5. Describe the terms of any beneficial trust or blind trust of which you, your spouse, or your dependents may be a beneficiary. In the case of a blind trust, provide the name of the trustee(s) and a copy of the trust agreement.
6. Provide a description of any fiduciary responsibility or power of attorney which you hold for or on behalf of any other person.
7. List sources and amounts of all items of value in an amount exceeding \$100.00 received by you, your spouse and your dependents during each of the last 3 years. This should include, but not be limited to, salaries, wages, fees, dividends, capital gains or losses, interest, gifts, rents, royalties, patents and honoraria. Gifts received from members of your immediate family need not be listed.
8. List sources, amounts and dates of all anticipated receipts from deferred income arrangements, stock options, executory contracts and other future benefits which you expect to derive from current or previous business relationships, professional services and firm memberships, employers, clients and customers.
9. Have you filed a Federal income tax return for each of the past 10 years? If not, please explain.
10. Have your taxes always been paid on time?
11. Were all your taxes, Federal, State, and local, current (filed and paid) as of the date of your nomination?
12. Has the Internal Revenue Service ever audited your Federal tax return? If so, what resulted from the audit?
13. Have any tax liens, either Federal, State, or local, been filed against you or against any real property or personal property which you own either individually, jointly, or in partnership?
14. Provide for the Committee the copies of your Federal income tax returns for the past 3 years. These documents will be made available only to Senators and a staff person designated by the Chairman and Ranking Member. They will not be available for public inspection.

AFFIDAVIT

being duly sworn, hereby states that he/she has read and signed the foregoing Statement on Biographical and Financial Information and that the information provided therein is, to the best of his/her knowledge, current, accurate, and complete.

Subscribed and sworn before me this _____ day of _____, 19____

Notary Public:

RESPONSES TO BIOGRAPHICAL AND FINANCIAL INFORMATION REQUESTED
OF NOMINEES

A. BIOGRAPHICAL INFORMATION

1. Crocker Nevin
2. Board of Governors, U.S. Postal Seervice
3. 5/16/86
4. Home: 62 East 91 Street
New York, NY 10128

Business: 1211 Avenue of the Americas
New York, NY 10036
5. 3/14/23, Tulsa, Oklahoma
6. Married, Marilyn English
7. Anne, 29; Paul, 28; Elizabeth, 26; Crocker Jr., 24
8. St. Paul's School, 1937-1942; Princeton University,
1942-1948, B.A.
9. CF&I Steel Corp., Chairman of Board - 5/31/85 to present
1211 Avenue of the Americas
New York, NY 10036

Drexel Burnham Lambert Inc., Sr. Advisor - 4/76 to present
1211 Avenue of the Americas
New York, NY 10036

Evans Products Co., Vice Chairman of Board - 4/74 to 4/76
Portland, Oregon

Marine Midland Bank, Consultant - 6/73 to 4/74
140 Broadway
New York, NY

Marine Midland Bank, Chairman of Board - 9/52 to 6/73
140 Broadway
New York, NY

John Robert Powers, Sales and Demonstration - 3/50 to 9/52
745 5th Avenue
New York, NY

Vick Chemical Co., Trainee - 3/48 to 3/50
120 Broadway
New York, NY

10. U.S. Postal Service Board of Governors

11. CF&I Steel Corp, Chairman of Board
1211 Avenue of the Americas
New York, NY 10036

Drexel Burnham Lambert, Inc., Sr. Advisor
1211 Avenue of the Americas
New York, NY 10036

The BOC Group, Director
85 Chestnut Ridge Road
Montvale, NJ 07645

Medco Containment Services, Director
491 Edward H. Ross Drive
Elmwood Park, NJ 07407

Magnetek Inc., Director
427 East Stewart Street
PO Box 2020
Milwaukee, WI 53201

WNET/Thirteen, Trustee
356 West 58 Street
New York, NY 10019

12. N/A

13. a. N/A

b. N/A

- c. Citizens for Kennedy, \$1,000; Hollings for President, \$250; Koch for Mayor, \$100; Carter for President, \$1,000; Democratic National Committee, \$1,000

14. N/A

15. N/A

16. N/A

17. a. No

- b. Long experience on a number of Public Corporate boards, Chief Executive of two.

B. FUTURE EMPLOYMENT RELATIONSHIPS

1. No
2. Yes, current employment
3. No
4. No

5. Yes

C. POTENTIAL CONFLICTS OF INTEREST

1. Continue current employment
2. None
3. None
4. None
5. N/A
6. Yes

D. LEGAL MATTERS

1. No
2. No
3. No
4. No
5. None

RESPONSES TO PREHEARING QUESTIONS FROM CROCKER NEVIN

I. NOMINATION PROCESS AND POTENTIAL CONFLICTS

1. Were any conditions, expressed or implied, attached to your nomination to be a Governor of the United States Postal Service? No
2. What commitments have you made with respect to the policies and programs you will attempt to implement as a Member of the Board of Governors? None
3. Are there any issues involving the Postal Service from which you may have to disqualify yourself? If so, please explain. No
4. Did you actively seek this nomination? Explain. No
5. Why do you feel you are qualified to be a member of the Board of Governors and what contribution do you feel you can make to the Postal Service as a member of the Board? As a director of a number of major public companies over the years and the chief executive of two, I feel that I have the experience and judgement to make a positive contribution to the affairs of the U.S. Postal Service. My experience includes finance, labor relation, public policy, and relations with a chief executive.

II. RESPONSIBILITIES OF THE BOARD OF GOVERNORS

1. What is your view of the role of the Board of Governors of the Postal Service? What do you believe are its most important functions and responsibilities? I believe that the interest of reorganization was to create a quasi-independent agency whose board would function much like that of a large public corporation with the added mandate of responding to congressional oversight. The primary role of the Board is to set broad general policies for the service and insure that these policies are properly and rigorously carried out by the Postmaster General. Selection of management, budgets, capital expenditures, and labor relations are all important responsibilities of the Board from a policy standpoint.
2. How do you view the relationship of the Board of Governors to the Postal Service and, specifically, to the Postmaster General? The Board is the basic governing body of the Postal Service. The Postmaster is responsible to it and is charged with executing its policies. The Board should appoint the Postmaster General, set his pay, and monitor his performance.

3. How do you view the relationship and responsibilities of the Board of Governors to the President, the public and the Congress? The Board's primary responsibility is to provide efficient, cost effective postal service to the public. The President and Congress, as elected representatives of the public, together make up the forum where the public's views are expressed. Since membership of this forum continually changes, I think it important for the Board to maintain a degree of independence to give a sense of continuity to the Service.

III. POSTAL REORGANIZATION

1. Various proposals have been made to increase the accountability of the Postal Service to the Congress including Presidential appointment of the Postmaster General or the Chairman of the Board of Governors. How do you feel about these proposals? I would be inclined to leave the appointment of the Postmaster General in the hands of the Board, but I think that he should also be Board Chairman which is more in keeping with practice in public corporations.
2. The Postal Rate Commission is a unique regulatory agency in that it does not have final decision-making responsibility with respect to most matters brought before it. As you know, this responsibility rests with the Board of Governors of the Postal Service. Do you believe that this arrangement should be maintained? If so, why? In my prior service on the Board, I was ambivalent about the rate commission. On the one hand, it seemed redundant in that it was mostly using the same numbers as the Board. On the other hand, I suppose it has and does provide a method of checking on the activities of the Board by a group of experts. Before expressing a definite opinion at this time, I would want to see how the system was working.
3. Would you recommend any changes in the role and responsibilities of either the Postal Rate Commission or the Board of Governors? Not at this time.

IV. POSTAL SERVICE OPERATIONS

1. To what extent do you view the Postal Service as a public service appropriately financed out of the United States Treasury? Philosophically, I agree with the concept of a service financed primarily by its users.

V. RELATIONS WITH CONGRESS

1. What suggestions do you have for strengthening the relationship of the Board of Governors to the Congress. Do you believe that this is necessary? I believe that the relationship of the Board to Congress is dynamic in the sense that the players are constantly changing and, as a result, depending on the people involved will always have an ad hoc rather than an institutionalized basis.
2. Do you agree without reservation to respond to any reasonable request or summons to appear and testify before any duly constituted Committee of the Congress? Yes

Statement of Daniel R. Levinson

Mr. Chairman, I am pleased to appear before you this morning as the President's nominee to be a member and Chairman of the Merit Systems Protection Board.

It is indeed a great honor to be selected to oversee the agency charged with protecting the integrity of the merit system. I believe that by background, experience, education and training, I am prepared to undertake this important challenge.

Over the course of my working life, I have held rank-and-file positions in the civil service at the city, state, and federal levels of government. And my experience has been among the most varied possible. I have delivered mail for the U.S. Post Office in New York City; I have helped draft endangered species act decisions for the Interior Department in Washington D.C.; and, as a member of a Bureau of Land Management fire crew, I have engaged in one of the most physically demanding and dangerous jobs in all of civilian service: suppressing range fires on Federal lands in California. More recently, I have held high-level positions of trust and responsibility in the Federal service, first as Deputy General Counsel of the Office of Personnel Management, and then as General Counsel of the Consumer Product Safety Commission.

As a lawyer, I have devoted most of my career to the employee relations field. My law practice has included more than six years of private sector, and two years of federal sector, work. I have studied civil service law as part of my formal academic training, and I have taught employee relations here in Washington at the Catholic University of America.

The MSPB, as you know, has as its primary mission the fair and impartial adjudication of employee appeals. The judicial and collegial process has been an abiding interest from my law school days. I helped work my way through school as Clerk to an Administrative Law Judge who also served as Chairman of the Federal ALJ Conference. Upon graduation, I clerked for two years with a state appellate court composed of eleven members. Most recently, I have served as counsel to the five member Consumer Product Safety Commission, thereby gaining experience with a collegial body similar in form to the MSPB. Given these experiences and my background, I am especially grateful to be offered this unique opportunity.

This is a crucial period for the Board. Although its primary function has been performed for over a century, the agency itself is still in its early years. The Civil Service Reform Act of 1978 made significant changes in civil service law, and as the Board approaches the completion of its first decade of operation, it is fitting to take stock of the progress it has made in establishing a jurisprudence that reflects the most recent intent of Congress.

I know that the Board is proud of its substantive record. Board decisions have withstood the scrutiny of the United States Court of Appeals for the Federal Circuit in 93% of the appeals filed. This is admirable, but it cannot tell the entire story. No single figure can. For the employee relations field is quintessentially about people. No two persons are alike, and every case presents, if not a novel, at least a unique set of circumstances. The Board must therefore always appreciate the special nature of every case before it. Its success cannot be measured by the appeals record alone. Every day, the Board must conduct its important adjudicative function in a sound, conscientious, and professional manner. Only in this way can it fairly earn the trust and respect of the employees and their agencies whom it serves.

Just as important is the need to render justice swiftly. The Board operates under a continuing mandate to achieve effective management and timely disposition of the cases Congress charged it with responsibility to decide. Long delays in the adjudication of civil service cases may indeed render decisions eventually issued, or relief ultimately awarded, pointless.

Again, I note that the Board takes pride in an expeditious case processing and decision schedule. According to its most recent annual report, the adoption of new methods and computer technology has virtually eliminated the Board's case backlog in the regions and at headquarters. The Board reported that over 99% of appeals were adjudicated within its 120-day time limit.

Notwithstanding these achievements, I believe that one of my first tasks as Chairman will be to review agencywide operations with a view toward identifying whether existing management and case handling reforms can be further improved, or whether additional efficiencies can be attained.

Thank you, Mr. Chairman, and I would be pleased to answer any questions you may have.

SENATE COMMITTEE ON
GOVERNMENTAL AFFAIRS

BIOGRAPHICAL AND FINANCIAL INFORMATION

A. BIOGRAPHICAL INFORMATION

1. Name: (Include any former names used.)
Response: Daniel Ronald Levinson
2. Positions to which nominated:
Response: Member and Chairman, Merit Systems Protection Board
3. Date of nomination:
Response: April 15, 1986
4. Address: (List current place of residence and office addresses.)
Response:

(Residence)	(Office)
3004 Federal Hill Drive	Office of the General Counsel
Falls Church, Virginia	Consumer Product Safety Commission
22044	Washington, D.C. 20207
5. Date and place of birth:
Response: March 24, 1949; New York City, New York
6. Marital status: (Include maiden name of wife or husband's name.)
Response: Married to Luna Lambert.
7. Names and ages of children:
Response: Luna Claire Levinson, 3 months
8. Education: List secondary and higher education institutions, dates attended, degree received and date degree granted.

<u>Name of Institution</u>	<u>Dates Attended</u>	<u>Degree and Date Received</u>	
Jamaica High School	9/64 to 6/67	Diploma	6/67
University of Southern California	9/67 to 6/71	A.B.	6/71
Georgetown University	9/71 to 6/74	J.D.	6/74
The George Washington University	9/76 to 9/77	LL.M. (Labor Law)	9/77

9. Employment Record: List all jobs held since college, including the title or description of job, name of employer, location of work, and dates of employment.

General Counsel
Consumer Product Safety Commission
Washington, D.C. March 1985-Present

Deputy General Counsel
Office of Personnel Management
Washington, D.C. February 1983-March 1985

Partner
McGuinness & Williams
Washington, D.C. January 1982- February 1983

Adjunct Lecturer
(Labor Relations in The Construction Industry)
Catholic University of America
Washington, D.C. 1982

Adjunct Lecturer
(Legal Methods)
American University Law School
Washington, D.C. 1981, 1982

Associate
McGuinness & Williams
Washington, D.C. January 1977-December 1981

Confidential Law Assistant
New York Supreme Court Appellate Division
Brooklyn, NY August 1974-August 1976

Clerk To Administrative Law Judge William Fauver
Department of The Interior
Arlington, VA 1973 (Summer)

Fire Crew Member
Department of The Interior
Bakersfield, CA 1972 (Summer)

10. Government Experience: List any advisory, consultative, honorary or other part-time service or positions with Federal, State or local governments, other than those listed above.

Member: Administrative Conference of The United States, 1984-1985

11. Business Relationships: List all positions held as an officer, director, trustee, partner, proprietor, agent, representative, or consultant of any corporation, company, firm, partnership, or other business enterprise, education or other institution.

Response: McGuiness and Williams, Washington, D.C.
Partner (1982-1983)

12. Memberships: List all memberships and offices held in professional, fraternal, scholarly, civic, business, charitable and other organizations.

Response:

Member-New York Bar

Member-Washington, D.C. Bar

Member-California Bar

Member-U.S. Supreme Court Bar

Member-Various Federal appeals and district court bars

American Bar Association

(Member: Section on Labor and Employment Law)

Federal Bar Association

The George Washington Law Association

Southern California Alumni Association

Phi Alpha Delta Law Fraternity

Tau Kappa Epsilon Social Fraternity

Delta Phi Epsilon Professional Fraternity

Georgetown University Alumni Association

The University Club of Washington, D.C.

The Washington Hebrew Congregation

13. Political affiliations and activities:

(a) List all offices with a political party which you have held or any public office for which you have been a candidate.

Response: None

(b) List all memberships and offices held in and services rendered to all political parties or election committees during the last ten years.

Response: I performed local precinct work for the Reagan-Bush campaign in 1980, for the Tribe for Senate campaign in 1982 and for the Greenblatt for Congress Campaign (Maryland), in 1982.

(c) Itemize all political contributions to any individual, campaign organization, political party, political action committee, or similar entity of \$50 or more for the past 10 years.

Response: 1984- \$250 Reagan-Bush, '84
 \$250 Warner for Senate
 1982- \$100 Greenblatt for Congress
 1983- \$100 McConnell for Supervisor

Note: I do not have records of contributions prior to 1982. But I have, periodically, made contributions of less than \$100 to the Republican party and its candidates.

14. Honors and Awards: List all scholarships, fellowships, honorary degrees, honor society memberships, military medals and any other special recognitions for outstanding service or achievements.
 Response:

Phi Beta Kappa

Blue Key Honorary Fraternity

Phi Eta Sigma Honorary Fraternity

Notes and Comments Editor, The American Criminal Law Review
 (1973-1974), Georgetown University Law Center.

15. Published writings: List the titles, publishers, and dates of books, articles, reports, or other published materials which you have written.
 Response:

- "Voluntary Standards Integral to The Consumer Product Safety Commission," Legal Times, September 10, 1985.

- "Judah P. Benjamin," Jewish War Veteran (Fall 1984) and Southern Partisan, (Fall, 1983).

- Personal Liability of Managers and Supervisors for Corporate EEO Policies and Decisions (Washington, D.C.: EEOC, 1982)

- "A Study of Preferential Treatment: The Evolution of IRS Assistance Programs," George Washington University Law Review, (1980)

- "After Abood: Public Sector Union Security and the Protection of Individual Public Employee Rights," American University Law Review (Fall 1977)

16. Speeches: Provide the Committee with two copies of any formal speeches you have delivered during the last five years which you have copies of and are on topics relevant to the position for which you have been nominated.
 Response: None.

17. Selection:

- a. Do you know why you were chosen for this nomination by the President?

Response: I believe I was chosen on the basis of my background, experience, education and training.

- b. What do you believe in your background or employment experience affirmatively qualifies you for this particular appointment?

Response: By education, I am trained as a lawyer, and hold a specialized graduate degree in employee relations law. My coursework specifically included the study of civil service law. Furthermore, I have authored several published works in employee relations and have taught in the field at the post-graduate level.

I have substantial experience in administrative law and in working with adjudicatory and collegial bodies. My employment record includes service as a law clerk to a U.S. Administrative Law Judge, and to an eleven member state appeals court. I practiced employee relations law in the private sector for six years, after which I served as Deputy General Counsel of the Office of Personnel Management, where MSPB practice and procedure were integral parts of my interagency work. More recently I have been serving as General Counsel to the Consumer Product Safety Commission, a collegial body similar in form to the MSPB.

With nearly three years of rank-and-file civil service experience, and over three years in the Federal Senior Executive Service, I have established a sure foundation for effective leadership of an agency, particularly an agency whose focus is the civil service itself. Management proficiency, academic qualifications, professional skill, and experience in collegial operations underscore my credentials for Chairman of the Merit Systems Protection Board.

B. FUTURE EMPLOYMENT RELATIONSHIPS

1. Will you sever all connections with your present employers, business firms, business associations or business organizations if you are confirmed by the Senate?
Response: Yes.
2. Do you have any plans, commitments or agreements to pursue outside employment, with or without compensation, during your service with the government? If so, explain.
Response: No.
3. Do you have any plans, commitments or agreements after completing government service to resume employment, affiliation or practice with your previous employer, business firm, association or organization?
Response: No.
4. Has anybody made a commitment to employ your services in any capacity after you leave government service?
Response: No.
5. If confirmed, do you expect to serve out your full term or until the next Presidential election, whichever is applicable?
Response: Yes.

C. POTENTIAL CONFLICTS OF INTEREST

1. Describe all financial arrangements, deferred compensation agreements, and other continuing dealings with business associates, clients or customers.
Response: None
2. Indicate any investments, obligations, liabilities, or other relationships which could involve potential conflicts of interest in the position to which you have been nominated.
Response: I am aware of none.
3. Describe any business relationship, dealing or financial transaction which you have had during the last 10 years, whether for yourself, on behalf of a client, or acting as an agent, that could in any way constitute or result in a possible conflict of interest in the position to which you have been nominated.

Response: In cases that might come before the NSPR involving the Consumer Product Safety Commission (where I have been serving as General Counsel), or the Office of Personnel Management (where I served as Deputy General Counsel), or where appellants might be represented by McGuiness and Williams (where I was previously associated), I would consider the need for recusal, as appropriate, on a case-by-case basis.

4. Describe any activity during the past 10 years in which you have engaged for the purpose of directly or indirectly influencing the passage, defeat or modification of any legislation or affecting the administration and execution of law or public policy.
Response: While serving as General Counsel of The Consumer Product Safety Commission, I have testified on the Commission's behalf, at various oversight and appropriations hearings.

5. Explain how you will resolve any potential conflict of interest, including any that may be disclosed by your responses to the above items. (Please provide a copy of any trust or other agreements.)

Response: If any conflicts of interest arise, I will deal with such questions openly. I would immediately disqualify myself on any matters constituting a conflict of interest, or the appearance thereof.

6. Do you agree to have written opinions provided to the Committee by the General Counsel of the agency to which you are nominated and by the Attorney General's office concerning potential conflicts of interest or any legal impediments to your serving in this position?

Response: Yes

D. LEGAL MATTERS

1. Have you ever been disciplined or cited for a breach of ethics for unprofessional conduct by, or been the subject of a complaint to any court, administrative agency, professional association, disciplinary committee, or other professional group? If so, provide details.
Response: No

2. Have you ever been investigated, arrested, charged or held by any Federal, State, or other law enforcement authority for violation of any Federal, State, county or municipal law, regulation, or ordinance, other than a minor traffic offense? If so, provide details.
Response: No

3. Have you or any business of which you are or were an officer ever been involved as a party in interest in any administrative agency proceeding or civil litigation?
Response: No

4. Have you ever been convicted (including pleas of guilty or nolo contendere) of any criminal violation other than a minor traffic offense?
Response: No

5. Please advise the Committee of any additional information, favorable or unfavorable, which you feel should be considered in connection with your nomination.
Response: None

PRE-HEARING QUESTIONS AND RESPONSES:

DANIEL R. LEVINSON

I. NOMINATION PROCESS AND POTENTIAL CONFLICTS

Question 1. Is there any issue currently under consideration by the Merit Systems Protection Board (MSPB) from which you may have to disqualify yourself? If so, please explain.

Response: I am aware of none.

Question 2. How were you selected to serve as a Member and Chairman of the MSPB? Were any conditions, express or implied, attached to your nomination?

Response: I was selected to serve as a Member and Chairman of the MSPB after completing several levels of interviews at the White House and furnishing a substantial amount of biographical and financial information. I believe I was selected on the basis of my experience, education, background and training. No conditions, express or implied, were attached to my nomination.

Question 3. Have you made any specific commitments with respect to the basic policies and philosophy you will seek to implement as a Member and Chairman of the MSPB? If so, please describe these commitments.

Response: No.

Question 4. Why did you take this appointment to be a Member and Chairman of the MSPB?

Response: I accepted this nomination because of the exciting challenge it presents to me. As an administrative and employee relations lawyer, I have devoted much of my career to the collegial and adjudicatory process, and to the civil service at a variety of levels. It is particularly gratifying to be offered the opportunity to apply all of these background elements to the task of administering the agency that protects the integrity of the Federal merit system.

Question 5. Why do you feel that you are particularly well qualified to serve in this position?

Response: By education, I am trained as a lawyer, and hold a specialized graduate degree in employee relations law. My coursework specifically included the study of civil service law. Furthermore, I have authored several published works in employee relations and have taught in the field at the post-graduate level.

I have substantial experience in administrative law and in working with adjudicatory and collegial bodies. My employment record includes service as a law clerk to a U.S. Administrative Law Judge, and to an eleven-member state appeals court. I practiced employee relations law in the private sector for six years, after which I served as Deputy General Counsel of the Office of Personnel Management, where MSPB practice and procedure were integral parts of my interagency work. More recently I have been serving as General Counsel to the Consumer Product Safety Commission, a collegial body similar in form to the MSPB.

With nearly three years of rank-and-file civil service experience, and over three years in the Federal Senior Executive Service, I have established a sure foundation for effective leadership of an agency, particularly an agency whose focus is the civil service itself. Management proficiency, academic qualifications, professional skill, and experience in collegial operations underscore my credentials for Chairman of the Merit Systems Protection Board.

II. THE MERIT SYSTEMS PROTECTION BOARD

Question 1. What do you believe to be the role and responsibilities of the MSPB?

Response: The MSPB is charged with "acting as the watchdog" of the Federal Merit System. Its primary role is to determine when abuses or violations of the civil service laws have occurred, and to order corrective action. It also has important governmentwide responsibilities, however, in ensuring that merit systems are conducted free from prohibited personnel practices.

Question 2. What do you believe are the MSPB's most important functions?

Response: The most important functions of the Board are to adjudicate employee appeals and actions, as well as complaints brought by the Special Counsel, in a fair and impartial manner; to conduct special studies of the merit systems to determine whether they are free from prohibited personnel practices; to analyze and report on the significant activities of the Office of Personnel Management; and to review the regulations issued by OPM to determine whether they require the commission of prohibited personnel practices.

Question 3. What do you feel are the most important functions of the position to which you have been nominated?

Response: As one of three members of the collegial body, I would have a duty to work with other members to ensure that employee appeals are adjudicated independently and expeditiously, and that studies and reports on civil service matters, and review of OPM rules and regulations, reflect the Board's best judgments and most thoughtful views.

While the three-member Board has responsibility for implementing its statutory functions, the Chairman, as Chief Executive Officer, is vested with responsibility for its overall operations. As Chairman, I would therefore assume important managerial functions to ensure that the agency's resources are utilized in a manner that promotes the Board's policy objectives.

Question 4. How do you see the relationship between the MSPB and (a) the Office of Personnel Management; (b) the Federal Labor Relations Authority; and (c) the Office of Special Counsel to MSPB?

Response: (a) The Board enjoys very important review responsibilities with respect to the Office of Personnel Management. Congress has mandated that the Board analyze and report on OPM actions, and that it review the validity of OPM regulations. Accordingly, I believe that the Board serves as a critical check on OPM's administration of the civil service. In addition, OPM's involvement in MSPB appeals creates a relationship not unlike that which exists between the Solicitor General and the U.S. Supreme Court in cases of importance to the Executive Branch.

(b) Both the Federal Labor Relations Authority and the Board have important adjudicatory and review responsibilities over the civil service. But unlike the Board, where the real parties in dispute are typically the employee and the agency, the parties in dispute in FLRA matters are generally the union and the agency. Notwithstanding the differences in focus, I believe the Board shares with the FLRA the responsibility to bring coherence and clarity to the various adjudicatory mechanisms established under the Civil Service Reform Act. This is exemplified in the many instances where an appellant is covered by a negotiated grievance procedure, thereby giving rise to the need to make an informed election of the forum within which the dispute will be heard.

(c) Although the Office of the Special Counsel is integrally related to the functions and mission of the Board, it operates as an independent investigatory and prosecutorial authority. I view its relationship to the Board as analogous to that between a prosecutor and judge.

Question 5. Do you believe that any changes in the functions and authority of the MSPB, FLRA, or Special Counsel are warranted?

Response: I have no suggestions for changes at this time. But, as I note in my response to question 8, below, the procedures governing so-called mixed cases are particularly complicated and may warrant a recommendation for statutory change.

Question 6. How do you see the relationship and responsibilities of the MSPB to (a) the President; (b) the Congress; and (c) the executive agencies?

Response: (a) Because the Board has broad powers in reviewing the personnel practices of numerous government agencies, the Congress took extra measures to assure that the Board would have that degree of independence necessary to exercise properly its authority. With respect to the Executive Office of the President, I note that the Board has authority to make simultaneous submissions of budgets and legislative proposals to Congress and the Executive Branch, thereby eliminating the need for prior approval by the Office of Management and Budget. Furthermore, the Board is permitted to appoint personnel essentially free of approval by the Executive Branch. By the same token, the Board has important reporting responsibilities to the President. It must report to the President whether the public interest in a civil service free of prohibited personnel practices is being adequately protected.

(b) The Board has important reporting responsibilities to the Congress, as well. To enhance Congressional oversight, without compromising the Board's independence, the Civil Service Reform Act requires the Board to report to Congress about appeals that are not decided within 120 days.

(c) Executive agencies typically appear before the Board as respondents. In view of the critical rights-vindicating function of the Board, executive agencies have the burden of conducting their personnel operations consistent with Board precedent. Furthermore, the Board's governmentwide review responsibilities of merit systems requires that agencies must not only exercise the proper degree of care in taking adverse actions, but must respond to the Board's identification of any systemic issues having an adverse impact on merit systems principles.

Question 7. How do you plan to ensure consistency between the decisions of the MSPB and the decisions of the FLRA in any cases which involve both, such as allegations of unfair labor practices or discrimination?

Response: Congress has placed no explicit mandate on the Board to ensure consistency between its decisions and those of the FLRA. This is true notwithstanding the statutory provision that permits an employee covered by a collective bargaining agreement that includes a dispute resolution procedure to choose to raise his or her claim either through the union or through the Board. I believe that the two agencies should be sensitive to developments in each other's case law, however, because differences in jurisprudence can have important implications for the caseloads of the two agencies. For example, if the bargaining agreement's grievance procedure purports to be "exclusive" regarding the type of action at issue, recourse to the Board will be unavailable. I therefore think it is critical for the Board, the FLRA, unions and employees not only to appreciate the differences between civil service and labor-management relations issues, but to understand fully the import of the election of remedies that Congress has provided.

As I note in my response to number 8, below, the question of consistency is more directly in issue in mixed cases raising allegations of discrimination. Although mixed cases may be grieved under the negotiated grievance procedure if so covered, the mixed case will ultimately be processed under the Board's and EEOC's mixed case regulations. Although I have no specific recommendations for change at this time, I believe that greater coherence and clarity in the relationship of MSPB and EEO jurisprudence is needed.

Question 8. Some have said that the mixed case process is too cumbersome, too long and too costly. To the extent that there is a problem, what steps would you take at MSPB to solve it? Do you believe statutory changes are advisable?

Response: The mixed cases, which include one or more allegations of prohibited discrimination raised in connection with an action appealable to the Board, is unduly complicated. Although the procedures are apparently designed to respect the expertise of different agencies charged with different mandates, I believe there is a point at which the sheer complexity of the remedial scheme may inadvertently contribute to the compromise of the rights they are supposed to protect. I believe one of my highest priorities is to address the mixed case procedure with a view toward simplification. If statutory changes are required, I will not hesitate to recommend them.

Question 9. Studies by the MSPB show that the number of federal employees who observed wrongdoing and feared reprisal if they came forward with reports of waste or mismanagement almost doubled from 1980 to 1983. Why do you think this is? Given this, do you believe the current system is effectively protecting "whistleblowers" from retaliatory action?

Response: Although I am not in a position to form a definitive opinion, I think two observations may lend an important perspective.

First, I note that this reported increase occurred early in the operation of the Civil Service Reform Act. Interestingly, an MSPB survey conducted when the CSRA was less than two years old found federal employees "generally ignorant" of the mechanisms intended to curb prohibited personnel practices. I would hope, and would work towards ensuring, that as the new statutory framework heads toward completion of its first decade, employees and their agencies more fully appreciate the important "whistleblower" protections provided in the CSRA.

Second, there appear to be more recent indications of improvement in the law's operation. In a book just published by the Office of the Special Counsel, Protecting the Integrity of the Merit System, it is noted that until 1983, that office had not successfully prosecuted any disciplinary action cases before the Board, except those involving Hatch Act violations. Since then, however, OSC has prosecuted charges of prohibited personnel practices and violations of other civil service laws against more than 60 Federal employees. By September 1985, OSC reports, it

had prevailed in all but two cases in which the Board had rendered final decisions. OSC concludes as follows:

"In the cases decided, the Board has imposed appropriate sanctions, including removal and demotion of a number of senior officials, in each case. Moreover, during 1983-1985, the office found it unnecessary to take any corrective action matter before the Board since, in each such case, the agency took the action recommended by the Special Counsel (except in one case in which the action became moot)."

These observations suggest that as the CSRA has matured and the CSRA agencies have gained experience and stability, the system's effectiveness in protecting "whistleblowers" may now be better than the 1980-1983 figures cited alone appear to indicate. Nevertheless, I pledge that as MSPB Chairman, I would give a fresh look to the issue to determine with greater certainty whether existing whistleblower protections are sufficient and truly effective.

Question 10. What action would you take at MSPB to maintain timely processing of cases by the Board despite possible Gramm-Rudman cuts?

Response: I cannot say at this time what action might be prudent or necessary to maintain timely processing of Board cases. According to its most recent annual report, the adoption of new methods and computer technology has virtually eliminated the Board's case backlog in the regions and at headquarters. The Board reported that over 99% of appeals were adjudicated within its 120-day time limit. In light of possible Gramm-Rudman cuts, one of my first tasks will be to review agencywide operations with a view toward identifying whether existing management and case handling reforms can be further improved, or whether additional efficiency procedures can be initiated.

III. THE CIVIL SERVICE REFORM ACT

Question 1. What do you feel are the most important principles of the Civil Service Reform Act?

Response: The most important principles of the CSRA are embedded in its twin goals of improving the efficiency of Government, and striking a proper balance between management

rights and employee protections. On the management side, pay-for-performance principles and streamlined personnel procedures are designed to reward managers for outstanding performance, and allow them to take appropriate steps where performance is less than satisfactory.

With respect to employee protections, Congress gave substantial attention to those aspects of the enabling legislation relating to the definition of a set of merit system principles to guide federal personnel management, the proscription of certain types of actions deemed to be inconsistent with the proper implementation of such principles, and mechanisms for protecting employees from arbitrary and capricious management actions, with particular attention to their protection from retaliation for disclosing information evidencing illegal actions, waste or mismanagement.

Question 2. Do you feel that the Civil Service Reform Act offers too much, too little, or the appropriate amount of protection for the Federal employee?

Response: I believe Congress established a statutory framework encompassing appropriate employee protections. Whether it can be said that they are in fact calibrated to properly address all the myriad circumstances in our vast and complex civil service system depends to a large degree on a careful evaluation of the practice, as well as the theory, of the governing statute. As the CSRA nears the completion of its first decade, such an evaluation becomes particularly worthwhile and, potentially, very productive. As MSPB Chairman, I will devote time and energy to making such an evaluation and acting on its results.

Question 3. Do you feel that any particular changes in the Act would be helpful toward carrying out the goals of the legislation?

Response: I have no suggested changes at this time.

IV. RELATIONS WITH CONGRESS

Question 1. Do you agree without reservation to respond to any reasonable summons to appear and testify before any duly constituted committee of the Congress if you are confirmed.

Response: Yes.

Question 2. Are you willing to provide such information as is requested by such committees?

Response: Yes.

FOR THE UNITED STATES SENATE
COMMITTEE ON GOVERNMENTAL AFFAIRS
BIOGRAPHICAL AND FINANCIAL INFORMATION

A. BIOGRAPHICAL INFORMATION

1. Name: (Include any former names used.) Henry Bowen Frazier III
2. Position to which nominated: Member of the Federal Labor Relations Authority
3. Date of nomination: March 24, 1986
4. Address: (List current place of residence and office addresses.)

(Residence)	(Office)
1605 Stonebridge Road	500 C Street, S.W., Suite 228
Alexandria, Virginia 22304	Washington, D.C. 20424
5. Date and place of birth: August 9, 1934; Bluefield, West Virginia
6. Marital status: (Include maiden names of wife or husband's name.)
Married to Joan McIntosh Frazier
7. Names and ages of children: None
8. Education: List secondary and higher education institutions, dates attended, degree received and date degree granted:

<u>Name of Institution</u>	<u>Dates Attended</u>	<u>Degree & Date Received</u>
Georgetown Univ. Graduate Law Center	9/82 to 6/85	M.L.T. 6/85
Georgetown Univ. Graduate Law Center	9/67 to 1/70	L.L.M. 6/70 (Labor Law)
George Washington Univ. Law School	9/62 to 6/67	J.D. with 6/67 Honors
University of Virginia	9/52 to 1/58	B.A. with 6/56 Honors
Suffolk High School	9/47 to 6/52	Diploma 6/52

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9. Employment Record: List all jobs held since college, including the title or description of job, name of employer, location of work, and dates of employment.

<u>Employer</u>	<u>Title</u>	<u>Dates</u>	<u>Location</u>
Federal Labor Relations Authority	Member (Acting Chairman)	1/79 to Present (9/84 to 12/85)	Washington, D.C.
Federal Labor Relations Council	Executive Director	1/73 to 1/79	Washington, D.C.
Federal Labor Relations Council	Deputy Executive Director	9/71 to 1/73	Washington, D.C.
Federal Labor Relations Council	Chief, Program Div.	6/70 to 9/71	Washington, D.C.
Department of Army	Acting Deputy for Civilian Personnel Policy & Civil Rights, OASA (M&RA)	5/70 to 6/70	Washington, D.C.
Department of Army	Chief of Civilian Personnel Policy & Civil Rights, OASA (M&RA)	3/69 to 5/70	Washington, D.C.
Department of Army	Chief of Civilian Personnel Policy, OUSA & OASA (M&RA)	10/68 to 3/69	Washington, D.C.
Department of Army	Special Projects Officer ODCSPER, OCP	12/64 to 10/67	Washington, D.C.
Department of Army	Staff Action Officer ODCSPER, OCP, P&PM Div.	4/63 to 12/64	Washington, D.C.

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(Employment Record Continued)

<u>Employer</u>	<u>Title</u>	<u>Dates</u>	<u>Location</u>
Department of Army	Position Classification Specialist	8/62 to 4/63	Fort Belvoir, VA
U.S. Air Force	Recalled to Active Duty	10/61 to 8/62	Andrews AFB, MD
Department of Army	Position Classification Specialist	10/59 to 10/61	Fort Belvoir, VA
Virginia State Employment Commission	Employment Interviewer	2/59 to 10/59	Alexandria, VA
U.S. Air Force	Active Duty for Training	10/58 to 2/59	Lackland AFB & Anarillo AFB, TX
Virginia Division of Mineral Resources	Administrative Assistant	2/58 to 10/58	Charlottesville, VA

10. Government experience: List any advisory, consultative, honorary or other part-time service or positions with Federal, State, or local governments, other than those listed above.

ANSWER: None

11. Business relationships: List all positions held as an officer, director, trustee, partner, proprietor, agent, representative, or consultant of any corporation, company, firm, partnership, or other business enterprise, education or other institution.

ANSWER: None

12. Memberships: List all memberships and offices held in professional, fraternal, scholarly, civic, business, charitable and other organizations.

ANSWER:

MEMBERSHIP IN ORGANIZATIONS

<u>Name in Full</u>	<u>Address</u>	<u>Dates</u>	<u>Office Held</u>
Omicron Delta Kappa	U of VA C'ville, VA	Nov '85 to Pres	None

(Continued)

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(Membership in Organizations Continued)

<u>Name in Full</u>	<u>Address</u>	<u>Dates</u>	<u>Office Held</u>
District of Columbia Bar	Washington D.C.	1980 to Pres	None
Bar of the Supreme Court of the U.S.	Washington D.C.	1971 to Pres	None
Sons of the American Revolution	Washington D.C.	1967 to Pres	None
Department of Army Civilian Personnel Alumni Association	Washington D.C.	1970 to Pres	Board of Directors (1978-1986) & Treasurer (1980-1986)
American Bar Association	Chicago, Ill	1979 to 1981	None
Society of Federal Labor Relations Professionals	Washington D.C.	1972 to Pres	None
Society of Professionals in Dispute Resolution	Washington D.C.	1974 to 1976	None
Industrial Relations Research Assn	Washington D.C.	1974 to 1975 1984 to 1985	None
Alexandria Taxpayers Assn	Alexandria VA	1977 to 1978	None
Assn of the U.S. Army	Washington D.C.	1968 to 1969	None
Virginia State Bar	Richmond VA	1967 to Pres	None
U of VA Alumni Assn	C'ville, VA	1964 to For Life	Nat'l Pres 1985-86 Nat'l VP 1984-85 Bd of Mgrs 1980 to Pres

(Continued)

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(Membership in Organizations Continued)

<u>Name in Full</u>	<u>Address</u>	<u>Dates</u>	<u>Office Held</u>
U of VA Club of Wash	Washington D.C.	1965 to Pres	Bd of Directors 1978 to Present
George Washington Law School Alumni Assn	G.W. Univ	1967 to 1968	None
Order of the Coif	G.W. Univ. Wash., D.C.	1967 to Pres	None
Virginia Student Aid Foundation	C'Ville, VA	1967 to Pres	Region XVI Bd of Directors (1976 to Pres)
Phi Beta Kappa	U of VA C'Ville, VA	1956 to Pres	None
Phi Kappa Psi	U of VA C'Ville, VA	1953 to 1957	Treasurer
Phi Eta Sigma	U of VA C'Ville, VA	1953 to Pres	None
Jefferson Society	U of VA C'Ville, VA	1953 to 1955	None
Laborers Int'l Union, AFL-CIO	Lafayette Ind	1953 to 1954 1956 to 1957	None
Aluminum Workers Union, AFL-CIO	Lafayette Ind	1955 to 1955	None
YMCA	U of VA C'Ville, VA	1952 to 1954	None
Skull and Keys	U of VA C'Ville, VA	1954 to 1956	None
Key Club	Suffolk HS	1950 to 1952	President & Treasurer
HiY Club	Suffolk HS	1950 to 1952	Secretary
Boy Scouts	Suffolk, VA	1948 to 1951	None

13. Political affiliations and activities:

- (a) List all offices with a political party which you have held or any public office for which you have been a candidate.

ANSWER: None

- (b) List all memberships and offices held in and services rendered to all political parties or election committees during last 10 years.

ANSWER: None

- (c) Itemize all political contributions to any individual, campaign organization, political party, political action committee, or similar entity of \$50 or more for the past 10 years.

ANSWER: 1985 - \$100 Democratic Party of Virginia
\$100 Durrette for Governor

1979 - \$1,000 Carter-Mondale Presidential Committee

14. Honors and Awards: List all scholarships, fellowships, honorary degrees, honorary society memberships, military medals and any other special recognitions for outstanding service or achievements.

Recognition by United States Government:

Special Citation for Exceptional Performance from the Director of Office of Management and Budget, The Chairman of Civil Service Commission and Secretary of Labor (1975).

Secretary of the Army Award for Exceptional Civilian Service (highest Army award for civilian personnel) (1970).

First Annual Kushnick Award for Outstanding Achievement in Civilian Personnel Administration presented by Secretary of Army (1968).

Outstanding Performance Award (1968).

Sustained Superior Performance Award (1961).

Unofficial Recognition:

Listed in: Marquis' Who's Who in the World (6th and 7th eds.) 1982-1985
Marquis' Who's Who in America (42nd and 43rd eds.) 1982-1985
Marquis' Who's Who in the East (18th, 19th and 20th eds.) 1981-1985
Marquis' Who's Who in Law (3rd ed.) 1983
Marquis' Who's Who in Government (1st, 2nd & 3rd eds.) 1972-present

Academic Honors:

Omicron Delta Kappa
 Order of the Coif
 Phi Beta Kappa
 Intermediate Honors Society (Second Year College Scholastic Honorary)
 Phi Eta Sigma (First year College Scholastic Honorary)
 Du Pont Regional Scholarship - University of Virginia
 Du Pont Fellowship - University of Virginia

15. Published writings: List the title, publishers, and dates of books, articles, reports, or other published materials which you have written.

ANSWER:

Published Articles (two copies of each are attached):

"The Federal Labor Relations Council," in Power, Sackman, Banier, Goodman & Ham (eds.), Negotiation/Arbitration '72. New York: Niagara University Press (1972).

"The Appellate Role of the Federal Labor Relations Council," in Labor-Management Relations in the Federal Government, The Bureaucrat, Vol. 2 (Special Issue 1973), pp. 16-26.

"Delineating Public Sector Labor-Management Issues," in New Directions in Public Administration: The Federal View. Washington, D.C.: The Bureaucrat (1975).

"The Scope of Bargaining in the Federal Sector," in Walter J. Gershenfeld, et al. (eds.), Scope of Public-Sector Bargaining. Lexington, Mass.: D.C. Heath & Co. (1977).

"Labor Arbitration in the Federal Service," The George Washington Law Review, Vol. 45, No. 4 (May 1977), pp. 712-56.

"Labor-Management Relations in the Federal Government," Labor Law Journal, Vol. 30, No. 3 (March 1979), pp. 131-38.

"Federal Employment," in Muriel K. Gibbons, et al. (eds.), Portrait of a Process--Collective Negotiations in Public Employment. Fort Washington, Pennsylvania: Labor Relations Press (1979).

"The Establishment of the FLRA," Federal Service Labor Relations Review, Vol. 3, No. 1 (1980), pp. 13-16.

"Negotiability Principles: Transition from E.O. 11491 to Title, VII," Federal Labor Relations Reporter (October 1980), Labor Relations Press, 80 FLRR No. 19.

(Continued)

(Published Articles Continued)

"The Federal Service Labor-Management Relations Statute," Selected Proceedings of the 29th Annual Conference of the Association of Labor Relations Agencies (1981), Labor Relations Press, Fort Washington, Pennsylvania.

"The New Foundation After Two Years: A Review and Outlook," Neutrals' Response to a Society in Dispute (October 1980), pp. 82-89.

"FLRA Policy and Practice on Arbitration Appeals: The Role of Regulation," Federal Labor Relations Reporter (June 1981), Labor Relations Press, 81 FLRR No. 9.

"Mid-Term Bargaining Obligations," Federal Labor Relations Reporter (September 1981), Labor Relations Press, 81 FLRR No. 15.

"Five Years Under the CSRA--The FLRA Perspective," Federal Labor Relations Reporter (March 1984), Labor Relations Press, 84 FLRR No. 4.

"Federal Employment," in Muriel K. Gibbons, et al. (eds.), Portrait of a Process--Collective Negotiations in Public Employment. Fort Washington, Pennsylvania: Labor Relations Press (1985).

"Remarks on Federal Sector Labor-Management Relations," Federal Labor Relations Reporter (April 1985), Labor Relations Press, 85 FLRR No. 6.

"Arbitration in the Federal Sector," The Arbitration Journal, Vol. 41, No. 1 (March 1986), pp. 70-76.

16. Speeches: Provide the Committee with two copies of any formal speeches you have delivered during the last 5 years which you have copies of and are on topics relevant to the position for which you have been nominated.

ANSWER:

Two copies of each formal speech of which I have copies and which I have delivered in the last 5 years on matters relating to the Federal Labor Relations program are attached. They include speeches to the following groups:

Western Region, Office of Personnel Management, Conference on the Arbitration of Labor disputes, San Francisco, California, April 1981.

Honolulu-Pacific Federal Executive Board, Honolulu, Hawaii, May 1981.

Federal Executive Institute Annual Collective Bargaining Symposium for Labor Relations Executives, Charlottesville, Virginia, July 1981.

(Continued)

(Speeches Continued)

American Bar Association Committee on Federal Labor-Management Relations Law, Annapolis, Maryland, February 1983.

Administrative Law Institute, Conference on Federal Labor Relations and the Law, Washington, D.C., February 1984.

Defense Logistics Agency, Labor-Management Relations Seminar for Commanders, Alexandria, Virginia, March 1984.

Administrative Law Institute, Conference on Federal Labor Relations and the Law, Denver, Colorado, March 1984.

Office of Personnel Management, Labor Relations Symposium, Gettysburg, Pennsylvania, September 1984.

Society of Federal Labor Relations Professionals, Washington Chapter, Washington, D.C., June 1985.

American Arbitration Association Summer Workshop, Stratton, Vermont, July 1985.

Department of the Navy East Coast Labor and Employee Relations Conference, Norfolk, Virginia, November 1985.

17. Selection:

(a) Do you know why you were chosen for this nomination by the President?

ANSWER: I believe that the President nominated me to be a Member of the Federal Labor Relations Authority (FLRA) because of my professional qualifications, i.e., because of my background and experience in the Federal Government, especially that experience in the Federal labor-management relations program from 1970 to the present, and my specialized legal training in the field of labor law.

(b) What do you believe in your background or employment experience affirmatively qualified you for this particular appointment?

ANSWER: My experience with the Federal Labor Relations Council from 1970 until 1979 and with the Federal Labor Relations Authority since 1979 as well as my graduate legal training in labor law qualified me for this particular appointment.

B. FUTURE EMPLOYMENT RELATIONSHIPS

1. Will you sever all connections with your present employers, business firms, business associations or business organizations if you are confirmed by the Senate?

ANSWER: Not applicable.

2. Do you have any plans, commitments or agreements to pursue outside employment, with or without compensation, during your service with the government? If so, explain.

ANSWER: No.

3. Do you have any plans, commitments or agreements after completing government service to resume employment, affiliation or practice with your previous employer, business firm, association or organization?

ANSWER: No.

4. Has anybody made a commitment to employ your services in any capacity after you leave government service?

ANSWER: No.

5. If confirmed, do you expect to serve out your full term or until the next Presidential election, whichever is applicable?

ANSWER: Yes.

C. POTENTIAL CONFLICTS OF INTEREST

1. Describe all financial arrangements, deferred compensation agreements, and other continuing dealings with business associates, clients or customers.

ANSWER: None.

2. Indicate any investments, obligations, liabilities, or other relationships which could involve potential conflicts of interest in the position to which you have been nominated.

ANSWER: None.

3. Describe any business relationship, dealing or financial transaction which you have had during the last 10 years, whether for yourself, on behalf of a client, or acting as an agent, that could in any way constitute or result in a possible conflict of interest in the position to which you have been nominated.

ANSWER: None.

4. Describe any activity during the past 10 years in which you have engaged for the purpose of directly or indirectly influencing the passage, defeat or modification of any legislation or affecting the administration and execution of law or public policy.

ANSWER: While serving as a Member of the Federal Labor Relations Authority, I have testified before various House and Senate Oversight Subcommittees and Appropriation Subcommittees.

5. Explain how you will resolve any potential conflict of interest, including any that may be disclosed by your responses to the above items.

ANSWER: If any potential conflicts of interest should arise I will first seek the advice of the Solicitor of the Federal Labor Relations Authority and the agency Ethics Officer. If necessary, the matter could be taken to the Government Ethics Office. I would immediately disqualify myself on any matters constituting such a conflict.

6. Do you agree to have written opinions provided to the Committee by the General Counsel of the agency to which you are nominated and by the Attorney General's Office concerning potential conflicts of interest or any legal impediments to your serving in this position?

ANSWER: Yes. (In the case of the Federal Labor Relations Authority such written opinions would be provided by the Solicitor of the agency.)

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D. LEGAL MATTERS

1. Have you ever been disciplined or cited for a breach of ethics for unprofessional conduct by, or been the subject of a complaint to any court, administrative agency, professional association, disciplinary committee, or other professional group? If so, provide details.

ANSWER: No.

2. Have you ever been investigated, arrested, charged or held by any Federal, State, or other law enforcement authority for violation of any Federal, State, county or municipal law, regulation or ordinance, other than a minor traffic offense? If so, provide details.

ANSWER: No.

3. Have you or any business of which you are or were an officer ever been involved as a party in interest in any administrative agency proceeding or civil litigation? If so, provide details.

ANSWER: Yes. My involvement in litigation and in administrative proceedings is detailed below by year:

1961: Willie Dew, et al. vs. Henry B. Frazier III, Municipal Court for the District of Columbia, No. M10043-61 (October 1961) -- Automobile accident liability suit for an accident which occurred on December 6, 1959. The matter never went to trial. Plaintiff and Plaintiff's mother failed to appear. I never heard any more about it. The State Farm Insurance Co. and their attorney, Francis X. Quinn handled the matter in my behalf.

1982: Professional Air Traffic Controllers Organization, Petitioner vs. Federal Labor Relations Authority, Respondent Federal Aviation Administration, Ronald W. Haughton, Albert Shanker, Henry B. Frazier III, Leon B. Applewhaite, Intervenors (U.S. Court of Appeals for the D.C. Circuit, No. 81-2135). On February 16, 1982, the United States Court of Appeals for the District of Columbia Circuit ordered the Federal Labor Relations Authority (FLRA) "to hold an evidentiary hearing to determine the nature, extent, source and effect of any and all ex parte contacts and other approaches that may have been made to any member or members of the Authority while the appeal from the decision of the Administrative Law Judge in Case No. 3-CO-105 was pending before the Authority." This case was the unfair labor practice case against PATCO which eventually led to the loss of PATCO's status as a labor organization under the Federal Service Labor-Management Relations Statute. In his report to the Court, the Administrative Law Judge who held the hearing ordered by the Court said, in pertinent part as to the Members' testimony before him:

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On the whole, I have found Mr. Frazier's and Mr. Haughton's testimony to be credible. On the other hand, Member Applewhite's testimony, in substantial parts, was confusing, contradictory, and in some respects incredible. A review of Member Applewhite's testimony demonstrates his sometimes confusing and contradictory testimony. . . .

With respect to credibility, there are a number of statements by Member Applewhite which I find difficult to accept.

As to the Court's concern about ex parte contacts and other approaches, the ALJ concluded that the possible ex parte contacts and approaches described at the hearing did not have any effect on the final decision of the Members of the FLRA in the PATCO case.

The Court of Appeals agreed and affirmed the decision of the Federal Labor Relations Authority wherein my opinion for the majority to revoke the exclusive recognition status of PATCO and its status as a qualified labor union was upheld. In so concluding the Court said: "There is no reason to vacate the FLRA decision or to remand the case to the FLRA for any further proceedings. We have not found any ex parte communications that irrevocably tainted the Authority's decision. Nor have the proceedings effected procedural unfairness on any of the parties."

4. Have you ever been convicted (including pleas of guilty or nolo contendere) of any criminal violation other than a minor traffic offense?

ANSWER: No.

5. Please advise the Committee of any additional information, favorable or unfavorable, which you feel should be considered in connection with your nomination.

ANSWER: None.

AFFIDAVIT

I, HENRY B. FRAZIER III, being duly sworn, hereby state that I have read and signed the foregoing Statement on Biographical and Financial Information and that the information provided therein is, to the best of my knowledge, current, accurate, and complete.

April 9, 1986
(DATED)

Henry B. Frazier III
(NAME)

Subscribed and sworn before me this 9th day
of April, 1986 in the District of Columbia

Betty B. Edwards
(Notary Public)

My Commission Expires July 21, 1988

Prehearing Questions for

Henry Bowen Frazier III

Nominated to be a Member of

The Federal Labor Relations Authority

I. NOMINATION PROCESS AND POTENTIAL CONFLICTS

Question 1. Is there any issue currently under consideration by the Federal Labor Relations Authority for which you may have to disqualify yourself? Have there been any such issues over the past seven years of your service at the FLRA? If so, please explain.

Answer: I am not aware of any matters from which I may have to disqualify myself. However, should a case arise in which it appears a conflict of interest or other similar circumstance exists which would prevent my acting or appearing to act in an impartial manner, I would seek the advice of the FLRA's Solicitor (who is also the Designated Agency Ethics Official). I would carefully consider that advice and if I concluded that my participation would in any way be inappropriate, I would disqualify myself. There have been no cases over the past seven years of my service at the FLRA wherein I have had to disqualify myself.

I. NOMINATION PROCESS AND POTENTIAL CONFLICTS

Question 2. Why do you believe the President renominated you to serve as a Member of the Federal Labor Relations Authority? Were any conditions, expressed or implied, attached to your renomination?

Answer: I believe that the President renominated me to serve as a Member of the Federal Labor Relations Authority because of my professional qualifications and experience. I have served as a Member of the FLRA since 1979 and prior to that time I served for nearly nine years at the Federal Labor Relations Council (which was the predecessor agency to the FLRA), including six years as the Executive Director of that agency. In addition, I hold an LL.M. in Labor Law from Georgetown University Law Center. I believe that this professional experience and training led the President to decide to renominate me. No conditions, express or implied, were attached to my renomination.

I. NOMINATION PROCESS AND POTENTIAL CONFLICTS

Question 3. Have you made any specific commitments with respect to the basic policies and philosophy you will seek to implement as a Member of the FLRA? If so, please describe these commitments.

Answer: I have made no specific commitments with respect to the basic policies and philosophy I will seek to implement as a Member of the FLRA. I will seek only to implement the provisions of Title VII of the Civil Service Reform Act (the Federal Service Labor-Management Relations Statute) to the best of my ability, consistent with the stated findings and purpose therein and consistent with Congressional intent as reflected in the language of the Statute and its legislative history.

I. NOMINATION PROCESS AND POTENTIAL CONFLICTS

Question 4. Why did you take this reappointment to be a Member of the Federal Labor Relations Authority?

Answer: I took this reappointment to be a Member of the Federal Labor Relations Authority because I believe that I can make a contribution to the administration of the Federal Service Labor-Management Relations Statute. I would bring to the position for which I have been nominated 16 years of directly applicable, high level legal and adjudicatory experience in the Federal sector labor-management relations program and an additional 11 years experience in Federal personnel work. My reappointment to the Authority would maintain, at the Members' level, an in-depth, first-hand knowledge of the Federal service labor-management relations program, its history and precedent, thereby providing continuity within the Authority.

II. THE FEDERAL LABOR RELATIONS AUTHORITY

Question 1. After seven years of service as a Member of the FLRA, have your views of the role and responsibilities of the Federal Labor Relations Authority changed?

Answer: In answering any question about the role and responsibilities of the Federal Labor Relations Authority, it is important to draw a distinction between the Federal Labor Relations Authority as an agency, which is composed of (a) the Members (a.k.a. "the Authority"), (b) the General Counsel and (c) the Federal Service Impasses Panel on the one hand, and that one component known as "the Authority" which consists of the Members and their immediate staff. As a Member, my responsibilities may be found in those assigned to the Authority in section 7105 of the Federal Service Labor-Management Relations Statute. These include among others, the adjudication and resolution of a variety of labor-management issues and the provision of leadership in establishing policies and guidance relating to matters covered by the Statute. After seven years of service as a Member, I continue to believe that the role of the Federal Labor Relations Authority in all its components is to insure that the statutory rights of individual employees, unions and agencies are protected, and their respective obligations are fulfilled, within the parameters of the statutory framework established by the Congress and approved by the President in Title VII of the CSRA. Moreover, I continue to believe it is the role of the Authority to promote a viable labor-management relationship in order to insure that parties to that relationship--unions and agencies--can resolve their mutual problems bilaterally.

II. THE FEDERAL LABOR RELATIONS AUTHORITY

Question 2. What do you believe are the FLRA's most important functions?

Answer: I believe that the most important functions of the Authority (i.e., the Members) are the adjudication and resolution of labor-management relations issues which are brought to the Authority by the parties and the provision of leadership in establishing policies and guidance under the Federal Service Labor-Management Relations Statute. The basic and most important function of the Authority appears to me to be that of interpreting and applying the provisions of the Federal Service Labor-Management Relations Statute to issues brought before it. That is, the Authority must determine the meaning of the Federal Service Labor-Management Relations Statute intended by Congress and apply the Statute to the resolution of those types of labor-management disputes concerning the rights and obligations of agencies, unions and employees spelled out in 5 U.S.C. 7105(a)(2). Further, in carrying out its leadership role, the Authority should promote sound labor-management relationships and promote the bilateral resolution of problems by the parties to those relationships, thereby helping to prevent the unnecessary litigation of disputes by labor and management and adjudication of those disputes by third parties such as the FLRA.

I continue to believe that the Authority, indeed each component of the agency, including the General Counsel and the Federal Service Impasses Panel, has a responsibility to do all that it can to encourage the voluntary, bilateral resolution of problems and settlement of disputes by the parties themselves and to prevent the development of the trend toward increasing reliance upon third parties--especially third parties whose functions are essentially adjudicatory in nature such as the FLRA. In the long term, the resolution of labor-management problems voluntarily by the parties will enhance the soundness of the labor-management relationship. As I pointed out seven years ago, Professor Douglas Brown of MIT, former President of the Industrial Relations Research Association, put it best when he wrote:

A legalistic process will produce decisions on cases but there is no assurance that it will resolve problems.

Certainly, the resolution of labor-management disputes by the FLRA or other third-party mechanisms will at times be necessary. Parties, at times, simply cannot resolve differences on their own and require the assistance of third parties.

II. THE FEDERAL LABOR RELATIONS AUTHORITY
Question 2 (continued)

Even when the parties turn to the FLRA for the resolution of unfair labor practice cases, much of the agency's initial efforts are devoted to facilitating the settlement of the case. In response to a recommendation of the General Accounting Office in a Report on "Steps Can Be Taken To Improve Federal Labor-Management Relations and Reduce the Number and Costs of Unfair Labor Practice Charges" (GAO/FPCD-83-5, November 5, 1982) that the "FLRA require the parties involved in alleged ULP's to hold discussions to try to informally resolve issues before having a formal ULP charge investigated by FLRA," the General Counsel amended his rules to provide that "normally, an unfair labor practice investigation will not commence until the parties have had a reasonable period of time after the filing of a charge, not to exceed fifteen (15) days, to informally resolve their dispute." This, in effect, formalized a practice which was already available to the parties because normally at least a fifteen-day period would pass before the General Counsel could begin an investigation.

Current statistics reveal a high settlement rate of unfair labor practice cases and the vast majority of these settlements occur after an investigation is begun. Thus, 93.5 percent of all meritorious unfair labor practice charges which are filed with the General Counsel are settled without a formal adjudication of the matter, 68.5 percent in the pre-complaint stage and 63 percent after an investigation has begun.

II. THE FEDERAL LABOR RELATIONS AUTHORITY

Question 3. What do you feel are the most important functions of the position to which you have been renominated?

Answer: My answer is essentially the same as it was in 1979. As a Member of the FLRA, I, together with the other Members, am charged with exercising those powers and carrying out those duties of the Authority, described primarily in section 7105 of the Statute. My most important functions, in exercising those powers and carrying out those duties, are:

- to interpret and apply the Statute in a manner consistent with the language of the Statute, its policies and purposes and the intent of Congress;
- to insure the integrity of the FLRA as an independent adjudicatory agency in the Executive Branch by serving in a truly neutral and impartial manner;
- to act in a timely and expeditious manner on all matters brought before the FLRA;
- to exercise my responsibilities in full recognition of the provisions in section 7101 that "labor organizations and collective bargaining in the civil service are in the public interest," and that the Statute "should be interpreted in a manner consistent with the requirements of an effective and efficient government."

The only change in my answer is the elimination of any reference to internal administrative operations of the agency. With the enactment of the Civil Service Miscellaneous Amendments Act of 1983, the Chairman became the Chief Executive and Administrative Officer of the agency. As a result the authority, the responsibility, and the accountability for internal administrative functions are vested in the Chairman alone.

II. THE FEDERAL LABOR RELATIONS AUTHORITY

Question 4. During your term, what has been the relationship between the FLRA and (a) the Office of Personnel Management and (b) the Merit Systems Protection Board?

Answer:

(a) I would characterize the relationship between the FLRA and the Office of Personnel Management as cordial, but "arms length." Although section 7105(i) of the Statute provides that in carrying out its functions the Authority may request from the Director of the Office of Personnel Management an advisory opinion concerning the proper interpretation of rules, regulations or policy directives issued by the Office of Personnel Management in connection with any matter before the Authority, the Authority has had occasion to do so only a few times. In such cases (e.g., 3 FLRA 615; 5 FLRA 452 and 5 FLRA 754) the Authority's interpretation of the Federal Personnel Manual was consistent with the OPM response. Additionally, OPM has participated as amicus curiae in a number of other cases. Of course, OPM may itself be a party in a case before the Authority.

As I said in 1979:

The Office of Personnel Management, as management's chief spokesperson, will issue guidance to Federal departments and agencies on the meaning and application of the Federal Service Labor-Management Relations Statute. I believe such guidance represents government management speaking to government management, stating management's opinion as to what the Federal Service Labor-Management Relations Statute means, and its opinion as to what management's rights and obligations under that Statute are. Government management can and indeed must issue labor management advice, guidance and instructions under the new Statute to government managers and supervisors--just as union headquarters must issue similar advice, guidance and instructions to its regional and local officials. But under the statutory scheme established by Congress, neither constitutes the final word. Rather, the final word as to the meaning of the Statute within the Executive Branch can only come from the Federal Labor Relations Authority. And so where the positions of government management and the unions differ under the Federal Service Labor-Management Relations Statute, the FLRA must resolve the dispute. Then either government management or the union may, if they choose, challenge that determination by the Federal Labor Relations Authority in Federal court.

II. THE FEDERAL LABOR RELATIONS AUTHORITY
 Question 4 (continued)

In March 1983 OPM published in the Federal Register a notice of an intent to promulgate in the Federal Personnel Manual an issuance concerning management rights, consultation and scope of bargaining policy in labor-management relations. Among other things, OPM attempted to set out a listing of specific matters that cannot be negotiated by management, matters which may be negotiated at the election of the agency, and mandatory subjects of bargaining. This proposed guidance was amended by OPM in another notice of intent to promulgate an FPM issuance published in the Federal Register in July 1983. In the meantime, two unions filed suit against OPM, asserting that OPM had no authority under the Statute to publish the FPM issuance. The U.S. District Court for the District of Columbia held in 1985 that OPM had acted within its authority to determine to issue "guidance." On appeal, the D.C. Circuit held, among other things, that no specific provisions of the Statute altered the authority of OPM to establish and maintain a program for policy guidance of agencies on labor-management relations, and affirmed the lower court. Thus, the D.C. Circuit, in effect, confirmed the view I expressed in 1979.

OPM has attempted to issue some other regulations in the labor-management area with mixed results. In the first of these attempts in January of 1985 OPM issued a final rule, which would have deleted provisions in the Code of Federal Regulations permitting the utilization of the negotiated grievance procedure concerning grievances over the denial of within-grade increases to employees covered by such a procedure. The amended regulations, in effect, required all employee dissatisfaction over the denial of within-grade increases to be taken to MSPB. As to this change, the U.S. District Court for the District of Columbia, in a suit brought by the National Treasury Employees Union held:

[A]s the CSRA was originally interpreted . . . Federal employees had the right to appeal a negative determination on a within-grade increase to the MSPB under a statutory procedure unless they were covered by a collective bargaining agreement. In the latter case, if the collective bargaining agreement permitted the filing of grievances on a matter, that procedure would be the exclusive procedure and the employee would not have the right to take an appeal to the MSPB.

On January 4, 1985, OPM suddenly announced that this interpretation of the law was incorrect. The new OPM view is that where there is a statutory appeals procedure . . . there can be no utilization of a collective bargaining grievance procedure.

II. THE FEDERAL LABOR RELATIONS AUTHORITY
 Question 4 (continued)

The Court concludes that OPM misinterpreted the relevant statutory provisions and that the amended regulation is not in accordance with law. It is clear from the legislative history that the mere fact that a statutory appeals process exists does not create a conflict with the negotiated grievance procedure. . . . It is clear . . . that "except for certain specified exceptions, an employee covered by a collective bargaining agreement must follow the negotiated grievance procedures rather than the agency procedures available to other employees not covered by an agreement." . . . The act contemplates that the negotiated grievance procedure will be the exclusive remedy for some grievances which, absent collective bargaining, would be subject to appeal by statutory right to the MSPB. . . .

The Court found the amended regulation inconsistent with law and declared it invalid.

In the second of these attempts in August 1985 OPM published (as part of their revised regulations governing RIF's, promotions, pay and retention preference) a proposed regulation which provided that an "employee may not grieve or appeal a performance rating." In the Federal Register OPM noted that over half of the agencies and all of the labor organizations who commented on the rule disagreed with it. OPM announced that revised regulations would "enable agencies to permit grievances of performance ratings, but agencies may determine that performance ratings will not be grievable." The revised proposed regulation itself read:

An employee must be given the right to ask for reconsideration of a performance rating by the supervisor or manager who approved the performance rating. . . . Additional procedures for review of a performance rating may be established at the discretion of the agency head.

OPM again asked for comments. Meanwhile, AFGE, NTEU and NFFE sought a preliminary injunction to stay implementation of all the regulations. Judge Thomas Penfield Jackson of the U.S. District Court for the District of Columbia denied the union's motions. Among other things, the Court rejected the unions' contention that a provision which permits the agency head to determine that performance ratings are not grievable is contrary to 5 U.S.C. § 7121. The Court noted that the regulation does not prevent the unions from bargaining with respect to grievances of performance ratings, but, instead, gives agencies only the "freedom to determine what bargaining

II. THE FEDERAL LABOR RELATIONS AUTHORITY
Question 4 (continued)

position to take when negotiating with a union, within the constraints of applicable law."

Given OPM's explanation of the revision and the language of the revision itself, it is not entirely clear how the Court arrived at that conclusion. However, that is what the Court said and, although it was a decision denying a preliminary injunction and not one on the merits, the Court's interpretation of those regulations as not preventing bargaining was the final tentative answer at the time. On March 11, 1986, OPM published in the Federal Register final regulations on the Performance Management System and in doing so deleted the provisions which were in dispute.

(b) I would most certainly characterize the relationship between FLRA and its sister agency, the MSPB, as cordial and friendly. The fears which some expressed in 1978 and 1979 about the potential for conflict between the two agencies because of an overlap in their respective jurisdictions has not materialized. In fact in a 1983 Report on a "Survey of Appeal and Grievance Systems Available to Federal Employees (GAO/GGD-84-17, October 20, 1983), the General Accounting Office reviewed the existing complaint handling mechanisms for Federal employees and "did not find any significant problem associated with the existing number or type of complaint handling mechanisms."

Staff personnel of FLRA headquarters and regional offices maintain informal contacts with MSPB to insure that problems do not develop when occasional cases involving the same factual situation may be brought before the two agencies simultaneously. This informal mechanism has been effective in avoiding inconsistent remedies and results in those instances which have thus far arisen.

The two agencies established in February 1986 a staff exchange program whereby professional staff members of one agency may be detailed to the other for a period of 90-120 days for training and development purposes.

Additionally, of course, MSPB may itself be a party in a case before the Authority.

II. THE FEDERAL LABOR RELATIONS AUTHORITY

Question 5. Based on your experience, do you believe that any changes in the functions and authority of the FLRA, OPM, or MSPB are warranted?

Answer: Having had no experience in OPM or MSPB, I do not consider myself qualified to make any suggestions concerning their functions and authority. The Federal Labor Relations Authority has initiated a resources assessment study which will include a thorough review of the agency's operations and procedures. This review will include an analysis of comments and recommendations submitted by unions and agencies in response to a request previously published by the FLRA in the Federal Register soliciting proposals concerning possible modifications to case processing procedures as well as comments and recommendations proposed by staff of the agency. The staff is preparing an analysis of the internally and externally generated suggestions with a series of recommendations for the Members to consider. It is entirely possible, indeed likely, that some changes in the functions and operations of the FLRA will be made or recommended by the Members as a result of this study. However, it would be premature to attempt to define them at this time.

II. THE FEDERAL LABOR RELATIONS AUTHORITY

Question 6. What actions have you taken and do you plan to take to ensure consistency between the decisions of the FLRA and the decisions of the MSPB in any cases which involve both, such as allegations of unfair labor practices or discrimination?

Answer: As I indicated in my answer to Question II. 4., above, staff personnel in the two agencies maintain informal communication and coordination to avoid conflict when functions clearly overlap. Additionally, where parties have brought an unfair labor practice case to the FLRA and an adverse action case to the MSPB and MSPB has issued an order, the Authority has taken such order into account when remedying the unfair labor practice violation. Department of the Air Force, Air Force Systems Command, Electronic Systems Division and National Association of Government Employees, Local R1-8, 14 FLRA 390 (1984). Moreover, where the Civil Service Reform Act requires a consistent approach by MSPB and FLRA, such an approach is taken. For example, in a recent decision reviewing and upholding an award of attorney fees by an arbitrator (Naval Air Development Center Department of the Navy and American Federation of Government Employees, Local 1928, AFL-CIO, 21 FLRA No. 25, March 25, 1986) I noted in my opinion that the Civil Service Reform Act requires an award of attorney fees under the Back Pay Act "must be in accordance with the standards established under 5 U.S.C. § 7701(g)." Section 7701(g) defines the authority of the MSPB to require payment by a government agency of attorney fees incurred by an employee or applicant for employment in a case before the MSPB. I pointed out that "the Authority is without discretion to ignore this requirement, or to fashion its own standards upon which an award of attorney fees may be made." I referred to the MSPB decision in Allen v. U.S. Postal Service, 2 MSPB 582 (1980), wherein MSPB had "developed standards for ascertaining when an award of attorney fees 'is warranted in the interest of justice' as well as other standards for such an award under 5 U.S.C. § 7701(g)(1)," the validity of which has been confirmed by the U.S. Court of Appeals for the Federal Circuit.

II. THE FEDERAL LABOR RELATIONS AUTHORITY

Question 7. During your confirmation process in 1979, you indicated your belief that important differences exist between labor-management relations in the Federal Government and practices and precedents in the private sector. Has your view changed?

Answer: I still adhere to the view, which I stated in 1979 that:

There are important differences between labor-management relations in the Federal Government and labor-management relations in the private sector. Congress, I believe, clearly recognized those differences when it enacted the Federal Service Labor-Management Relations Statute (Title VII of the Civil Service Reform Act). If it had chosen to do so, Congress could have amended the National Labor Relations Act simply to extend its coverage to the Federal civil service. Congress did not do so. Instead, it established a separate Statute to govern labor-management relations in the Federal Government. In doing so, the Congress stated that the purpose of the Statute is "to prescribe certain rights and obligations of the employees of the Federal Government and to establish procedures which are designed to meet the special requirements and needs of government." [Emphasis added.] While the functions, organization, and procedures of the FLRA, as reflected in that Statute, closely resemble those of the NLRB, the substance of the Statute is in many respects quite different from NLRA. In interpreting and applying the provisions of the Statute consistent with the intent of Congress and the purposes of the Statute, my decisions will reflect the differences which Congress recognized and provided for. I support the philosophy reflected in the Statute as to the special requirements and needs of government and as to the differences between the public and private sectors.

A review of the 4,191 cases which the Authority has closed through March 31, 1986, will reveal some of the unique features of the Federal labor-management relations program. I suppose the most prominent, overriding feature is the fact that labor management relations in the Federal sector must operate within the framework of that immense body of law, most of which is contained in Title 5 of the United States Code, which governs nearly every aspect of the employment relationship between Federal employees and their employer, the Federal Government. There is nothing in the private sector to compare with the

II. FEDERAL LABOR RELATIONS AUTHORITY
Question 7 (continued)

extent to which law and implementing rules and regulations govern working conditions in the Federal sector. As a consequence, a large portion of the Authority's cases involves a reconciliation of existing laws and regulations with the requirements, rights and obligations of agencies and unions which are defined in the Federal Service Labor-Management Relations Statute.

II. FEDERAL LABOR RELATIONS AUTHORITY

Question 8. What steps have you taken to improve the operation of the FLRA?

Answer: During the period September 1, 1984 through December 14, 1985, I served as Acting Chairman of the Federal Labor Relations Authority. On October 1, 1985, I issued a statement announcing that the Authority had completed its most productive year ever. I do not personally claim the credit for that achievement. As I said at the time, I attribute this outstanding achievement to the dedication and hard work of everyone at the Authority. To put this accomplishment in perspective, I quote from my statement:

The Federal Labor Relations Authority in Fiscal Year 1985 closed the largest number of cases ever in a single year, Acting Chairman Henry B. Frazier III, announced today. Between October 1, 1984 and September 30, 1985, the Authority closed 822 cases thereby reducing the number of pending cases from 737 at the beginning of the fiscal year to 460 at the end. This reduction was accomplished even though 545 new cases were filed with the Authority during the same period.

According to Frazier, "This continues the trend which was begun in the previous fiscal year when the Authority closed 750 cases. In addition to having just completed our best year ever, during FY '85 we also had our best first quarter of any fiscal year when we closed 211 cases and our best quarter of any quarter ever, when, during the third quarter, we closed 268 cases. The production during the first quarter gave us a head start on the year and the tremendous effort during the remainder of the year pushed us over the top. This accomplishment enabled the agency to exceed its goal of closing 780 cases, a goal which was established during the development of agency objectives before the year began."

"I believe the Authority is at long last reaching the point where cases can be assigned and work can begin on them immediately after all documents have been filed by the parties. I hope that the elimination of so much of the older case backlog will enable us now to develop a smoothly functioning process so that cases will move in a steady stream through the Authority and decisions will issue in less time than in the past. I attribute this outstanding achievement to dedication and hard work of everyone at the Authority," Frazier said.

II. FEDERAL LABOR RELATIONS AUTHORITY
Question 8 (continued)

Frazier added, "Over the past couple of years we have made every effort to increase the efficiency and productivity of the agency through a series of management improvement initiatives involving personnel in every aspect of our operations. Among these initiatives were organizational changes and the elimination and/or compressing of levels of review; increasing the availability of electronic legal research tools; utilizing special 'task forces' to concentrate on the resolution of older cases; standardization of the format of decisions to the maximum extent; refinement of the computerized case tracking system, including increasing the capability of our automated data base, to permit the early identification and resolution of case processing problems and to enhance the overall management of the caseload and the allocation of resources; and additions of word processing equipment and improvements in its use. Furthermore, many cases are being processed faster than in the past because they can be resolved on the basis of the extensive precedent developed during the first five years of the Authority's existence. But, the most important factor has been the renewed determination of personnel at all levels within the agency to eliminate the 'backlog' so that all cases can be actively processed through the case management system on a timely and current basis."

II. FEDERAL LABOR RELATIONS AUTHORITY

Question 9. What is the current caseload of the FLRA and what kind of caseload do you project for this year? Do you have any recommendations as to case processing?

Answer: As of March 31, 1986, 512 cases were pending at the Authority. For FY 1986, the Authority had projected a new case intake of 535 cases which added to the 460 cases pending at the end of FY 1985 would total a workload of 995 cases. As I indicated in my answer to Question II. 5. above, the FLRA has undertaken a thorough review of the agency's operations and procedures. This review will include an analysis of comments and recommendations submitted by unions and agencies in response to a request previously published by the FLRA in the Federal Register soliciting proposals concerning possible modifications to case processing procedures as well as comments and suggestions proposed by staff of the agency. The staff is preparing an analysis of the internally and externally generated suggestions with a series of recommendations for the Members to consider. It is entirely possible, indeed likely, that some changes in the functions and operations of the FLRA will be made or recommended by the Members as a result of this study. However, it would be premature to attempt to define them at this time.

II. THE FEDERAL LABOR RELATIONS AUTHORITY

Question 10. The law established the General Counsel position at the Federal Labor Relations Authority to investigate and prosecute complaints. Since the Authority was established, differences of opinion have existed as to the proper degree of independence for the General Counsel from the Authority. What is your view as to the amount of independence needed by the General Counsel to adequately perform the prosecutorial role? What do you believe the Authority should do to resolve this debate and promote a harmonious working relationship?

Answer: The Authority, i.e., the Members of the FLRA, as I have indicated in the answer to II. 1., above, perform an adjudicatory function; that is, the FLRA decides cases. A major portion of those cases are unfair labor practice cases. Under section 7105(a)(2)(G), the Authority conducts hearings (through Administrative Law Judges) and resolves complaints of unfair labor practices under section 7118. Under section 7104(f)(2)(A) and (B), the General Counsel possesses independent statutory authority to investigate unfair labor practice charges and to file and prosecute unfair labor practice complaints. Those complaints are prosecuted before the Administrative Law Judges of the FLRA and ultimately decided by the Authority, i.e., Members of the FLRA. Therefore, in the investigation and prosecution of unfair labor practice cases, the relationship between the Authority and the General Counsel is and should be "arms length." I believe that Congress intended this relationship to be similar to that which exists between the Members of the National Labor Relations Board and the General Counsel of the Board, or to that which exists between Judge and Prosecutor, because those roles are analogous to the roles of the Members of the FLRA and the General Counsel of the FLRA. In a word, the independence of the General Counsel in investigating and prosecuting unfair labor practice cases is and should be respected by the Members of the FLRA.

The differences of opinion which have arisen concerning the proper degree of independence for the General Counsel from the Authority relate solely to resources and more specifically as to who possesses the authority, responsibility and accountability for the allocation among the Authority Members, the General Counsel and even the Federal Service Impasses Panel of resources allotted to the FLRA. As the Statute is currently written, I believe that the Chairman of the Federal Labor Relations Authority, as Chief Executive and Administrative Officer of the agency, possesses that authority, that responsibility and that accountability.

II. FEDERAL LABOR RELATIONS AUTHORITY

Question 10 (continued)

As the GAO stated in their recent Report on Federal Labor Relations Authority Administrative Rules and Case processing (GAO/GGD-86-57, March 1986), I believe that taken together, the Civil Service Miscellaneous Amendments Act and the Anti-Deficiency Act support this view. In a legal memorandum of October 15, 1984, on the role of the Chairman regarding budget matters, the Solicitor concluded that Congress intended the Chairman to exercise exclusive authority and responsibility regarding internal FLRA administrative decisionmaking, including budget matters but that the Chairman may not take administrative actions which would detract from the authority of the other Members, or components of the FLRA such as the General Counsel, regarding substantive labor-management relations issues. The designation of the Chairman "as chief executive and administrative officer of the Authority" provides support for this view. With respect to the Anti-Deficiency Act, 31 U.S.C. § 1341(a) mandates that "an officer or employee of the United States Government" shall not "make or authorize an expenditure or obligation exceeding an amount available in an appropriation. . . ." [Emphasis added.] Another portion of that Act, 31 U.S.C. § 1349(a), states that any officer or employee of the Federal Government violating § 1341(a) shall be subject to "appropriate administrative discipline" for such a violation. Under the Authority's own regulations concerning the administrative control of funds, FLRA 2520.1B (July 16, 1984), the Chairman of the Authority is responsible for "control[ing] agency-wide obligation levels within approved allotment and apportionments." FLRA 2520.1B, § 5a. It is entirely possible within this statutory and regulatory framework, that a Chairman may be held responsible for any authorization of an obligation that exceeds an appropriation in violation of 31 U.S.C. § 1341(a), including any by the General Counsel's office, thereby subjecting the Chairman to discipline under 31 U.S.C. § 1349(a). If the Chairman had no advance knowledge of or authority to control such expenditures, he possesses accountability but no authority which makes no sense to me.

The Statute assigns the General Counsel responsibility for investigating and prosecuting alleged unfair labor practices; authority and responsibility for employees of the General Counsel, including those in the Authority's Regional Offices; and "such other powers of the Authority as the Authority may prescribe." These provisions collectively establish the General Counsel as an independent entity only insofar as specifically provided by Congress or delegated by the Authority and independent budgetary authority has not been so vested in

II. FEDERAL LABOR RELATIONS AUTHORITY
 Question 10 (continued)

the General Counsel. To contend that the General Counsel possesses independent budgetary authority on the grounds that he possesses certain independent substantive labor-management authority under the Statute is an argument that could likewise be logically extended and applied to the Federal Service Impasses Panel, the office of each Member of the Authority and to some extent to the office of Administrative Law Judges each of which possesses a high degree of statutory independence. The practice of the NLRB wherein responsibilities for the agency's administrative functions falls within the purview of the General Counsel is not an apt comparison. Even though the statutory functions and general organizational set-up of the NLRB and FLRA are similar, the two agencies are intrinsically different when it comes to internal administrative functions. The FLRA by Statute is required to have an Executive Director, and more importantly the FLRA's Chairman is by Statute designated as chief executive and administrative officer, neither of which find a parallel in the National Labor Relations Act. For reasons of their own, the Members of the NLRB decided to place agency administrative functions under the Board's General Counsel. Those reasons are irrelevant to considerations of proper administrative functioning of the FLRA. Nevertheless, so far as I know the Board and the General Counsel do not possess separate budgetary authority which is, in effect, what the General Counsel of the FLRA appears to be seeking.

A separate budget authority for the General Counsel is unnecessary and would interfere with effective financial management within the agency. Furthermore, I am not aware of any action by the Chairman (or by the Members prior to the 1983 amendments) with respect to budget matters which has interfered with the substantive statutory authority of the General Counsel to investigate and prosecute unfair labor practice cases. Sufficient checks exist on the Chairman's authority to prevent him from interfering with the General Counsel's statutory responsibilities, including review of the Authority's budget and oversight by the Office of Management and Budget and the White House and by Congressional Appropriation and Oversight Committees.

It should be emphasized that the General Counsel and the Chairman/Members of the Authority are not adversaries in the execution of their substantive functions under the Statute. In issuing unfair labor practice complaints and in prosecuting unfair labor practice cases the General Counsel provides "grist" for the Authority's "mill." We are both part of the process through which unfair labor practice cases are processed. To think that the Chairman of the Authority would

II. FEDERAL LABOR RELATIONS AUTHORITY
Question 10 (continued)

attempt to prevent the General Counsel from issuing complaints and prosecuting unfair labor practice cases by denying the General Counsel needed resources is ludicrous. The issue is whether there should be one individual responsible and accountable for allocating limited, and indeed declining resources, among the various elements of the agency. If one individual should perform this function, who should that individual be? I believe that it should be, and is by law, the Chairman who has been designated Chief Executive and Administrative Officer of the agency. If it does not fall to the Chairman to make such allocations, I believe Congress must then assume the responsibility for doing so through the mechanism of separate budgets for the several components of the agency.

III. THE CIVIL SERVICE REFORM ACT

Question 1. What do you feel are the most important principles of the Civil Service Reform Act?

Answer: I believe the most important principles of the Civil Service Reform Act are reflected in those provisions which establish and define the following key features of the Act: the labor-management relations program; the merit system; adverse actions; staffing; prohibited personnel practices; employee protections; performance appraisal systems; merit pay; grade and pay retention; and the Senior Executive Service.

III. THE CIVIL SERVICE REFORM ACT

Question 2. Do you feel that the Civil Service Reform Act offers too much, too little, or the appropriate amount of protection for the Federal employee?

Answer: My experience is limited to the administration of Title VII of the Civil Service Reform Act. I do not consider myself sufficiently experienced and knowledgeable of the other sections of the Act to draw a valid conclusion as to the degree of employee protection afforded the Federal employee by those provisions. As for Title VII, I have heard unions and agencies present conflicting views on the subject. Representatives of each side at times seem to feel that Title VII does not serve their respective needs. As for the individual Federal employee, I have rarely heard an expressed view. From my vantage point as a Member of the Authority, I cannot find sufficient evidence in the cases which are brought before us upon which to base a valid conclusion, supported by convincing evidence, that Title VII offers too much or too little protection for the individual Federal employee.

III. THE CIVIL SERVICE REFORM ACT

Question 3. Do you feel that any particular changes in the Act would be helpful toward carrying out the goals of the legislation?

Answer: As one who has in the past been engaged in the administration of only Title VII of the Act, I do not believe that I possess sufficient expertise about the other titles to make a judgment concerning the need for change. As for Title VII, as I have mentioned, the FLRA has initiated a thorough review of the agency's operations and procedures which will include consideration of comments and recommendations from unions, agencies and the FLRA's own staff. The staff is analyzing the suggestions and will make recommendations for consideration by the Members. It is entirely possible, indeed likely, that changes in the functions and operations of the FLRA will be made or recommended by the Members as a result of this review and these may include recommendations for statutory changes or adjustments. However, it would be premature to attempt to define them at this time.

IV. RELATIONS WITH CONGRESS

Question 1. Do you agree without reservation to respond to any reasonable summons to appear and testify before any duly constituted committee of the Congress if you are confirmed?

Answer: I agree without reservation to respond to any reasonable summons to appear and testify before any duly constituted committee of Congress.

IV. RELATIONS WITH CONGRESS

Question 2. Are you willing to provide such information as is requested by such committees?

Answer: I am willing to provide such information as is requested by such committees so long as my action in this regard is otherwise consistent with law.



UNITED STATES OF AMERICA
FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C. 20424

July 23, 1986

OFFICE OF THE MEMBER

Honorable William V. Roth, Jr.
Chairman
Committee on Governmental Affairs
United States Senate
Washington, D.C. 20510

Dear Mr. Chairman:

I am forwarding with this letter the additional information which several members of your Committee requested during my confirmation hearings on July 16 and 17.

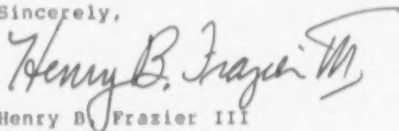
This material includes:

- (1) Explanation of 16 "step" case tracking system requested by Senator Stevens;
- (2) Statistics requested by Senator Stevens with respect to unfair labor practice and arbitration cases;
- (3) Material requested by Senators Stevens and Eagleton concerning the allegation of Member McGinnis that he was unaware that cases were being held in abeyance;
- (4) Background material requested by Senator Eagleton concerning the FLRA's consideration of the question of a separate vs. a unitary staff;
- (5) Material relating to alleged ex parte contact in connection with the PATCO case which Senator Eagleton requested for the record;
- (6) Additional information requested by Senator Gore as to whether the FLRA has reversed its position on mid-term bargaining obligations;
- (7) Information concerning the "excessive interference" standard requested by Senator Gore;
- (8) Responses to three questions submitted by Senator Glenn.

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I appreciate this opportunity to explain fully these matters for the record. Should you or any member of the Committee require additional information, I would be happy to provide it.

Sincerely,



Henry B. Frazier III
Member

Enclosures

EXPLANATION OF 16 "STEP" CASE TRACKING SYSTEM REQUESTED BY
SENATOR STEVENS:

This is in response to Senator Stevens' request for additional information on the case processing system, including the 16 "step" case tracking system, and action I had taken with respect to the case processing system while I was Acting Chairman.

Cases at the FLRA are subject, at the most, to only three levels of substantive review (professional, supervisor and Assistant Chief Counsel) before they reach the Member's Offices. In fact, some case decisions are produced by staff task forces and are forwarded directly to Members' offices without any intervening level of review; some are forwarded to the Members from the first-line supervisor. The degree of review accorded a case is determined on the basis of its complexity.

Some time before I became Acting Chairman, the FLRA instituted a computerized case tracking system which presently has 16 "control points" for cases as they are processed for decision. This computerized case tracking system was initially developed several years ago by the Executive Director of the agency and his staff and has been periodically refined by subsequent Executive Directors to improve its effectiveness as a management tool to monitor case processing at the agency. Dates of key steps (or control points) in processing are entered into our data base in order that the status of a case may be monitored for management control purposes. It should be noted that the number of 16 "control points" was selected for ease of administration. A case never goes through all 16 "control points." At certain stages a case is processed through one "control point" or another (e.g., point 3 or point 4; point 5 or point 6). A copy of the printed case production log (Enc. 1) and an explanation of the dates which are entered on the form and in the computerized data base (Enc. 2) are attached.

While I was Acting Chairman I did not direct any change in the case tracking system itself although the Executive Director may have made operational refinements in its use at his level. However, I did continue and expand a number of management improvement initiatives to increase the efficiency and productivity of the agency which helped produce the highest level of productivity in the history of the agency. The initiatives are described in Enclosure 3.

FEDERAL LABOR RELATIONS AUTHORITY

ENC. 1

Page ____ of ____

DECISION PRODUCTION LOG

CASE NUMBER (S) _____ REMAND _____ RECON _____

CASE NAME _____

SUPERVISOR _____ PROFESSIONAL _____ / /
(DATE OF AGENDA)

OTHER ACTIONS _____

EVENTS _____ (CONT. ON BACK)

ABEYANCE DATE IN ____/____/____	HELD AT STEP ____	DATE OUT ____/____/____	ABEYANCE DATE IN ____/____/____	HELD AT STEP ____	DATE OUT ____/____/____
REMARKS _____ _____ _____			REMARKS _____ _____ _____		

PHASE	STEP	STEP DATE (FIRST TIME THIS LEVEL)
PROCEED REVIEW	1 RECEIVED AT NATIONAL OFFICE	____/____/____
	2 PROFESSIONAL STARTS PROCEDURAL REVIEW	____/____/____
	3 RETAINED BY OFFICE OF CASE MANAGEMENT	____/____/____
MERITS REVIEW	4 FORWARDED TO EXPEDITER	____/____/____
	5 RETAINED BY EXPEDITER	____/____/____
	6 TRANSFERRED TO ACC-REP/ULP	____/____/____
	7 FORWARDED TO TEAM SUPERVISOR	____/____/____
PREPARATION AND REVIEW	8 ASSIGNED TO PROFESSIONAL	____/____/____
	9 PROFESSIONAL STARTS WORK	____/____/____
	10 PROFESSIONAL FINISHES WORK (DRAFT TO TYPIST)	____/____/____
	11 PROPOSED DECISION TO TEAM SUPERVISOR	____/____/____
	12 PROPOSED DECISION TO ACC	____/____/____
MEMBERS' REVIEW	13 PROPOSED DECISION TO CHIEF COUNSEL	____/____/____
	14 PROPOSED DECISION TO DIRECTOR, OCM	____/____/____
	15 PROPOSED DECISION TO MEMBERS	____/____/____
	16 DECISION ISSUED	____/____/____
RECYCLE ACTIONS	From _____ To _____ Date(MM/DD/YY) _____ REMARKS _____	From _____ To _____ Date(MM/DD/YY) _____ REMARKS _____
	From _____ To _____ Date(MM/DD/YY) _____ REMARKS _____	From _____ To _____ Date(MM/DD/YY) _____ REMARKS _____

Explanation of the dates which are entered on the form and in the Computerized data base:

The dates which are entered into the data base may be described as follows:

1. The date on which a case is received by the Authority and docketed-in as an open case by the clerical staff.
2. The date on which "procedural processing" of the new filing starts. This involves an Office of Case Management professional employee making sure that the filing is not in any way deficient and retaining it until all documents and materials which must be filed pursuant to Authority regulations have been received. This step does not involve any consideration of the substantive issues in the case but insures that there has been full compliance with the Authority's procedural requirements before any time is spent on the substantive issues in the case.
3. If it is determined that the filing is procedurally deficient, this "control point" is the date on which it has been determined that a filing is to be disposed of on such grounds, e.g., untimely filing. If this is to be done, a dispositive order is prepared and forwarded to the Managing Director for Case Processing for issuance under delegated authority. If a case is closed on procedural grounds, the case is not processed beyond this point.
4. If the case filing complies with procedural requirements, this control point is the date on which a completed filing is forwarded to the appropriate subject matter expeditor for a determination as to how the substantive issues in the case should be handled, i.e., whether the case is susceptible to "short-form" disposition pursuant to existing case law or whether the case warrants a "long-form" decision. The expeditors who make the determination are a senior non-supervisory professional in each of the three subject matter areas.
5. If the expeditor determines that the case is susceptible for "short-form" treatment and retains it for preparation of a draft, this control point is the date on which such a determination is made.
6. If it is determined that a "long-form" decision is called for, this control point is the date on which such cases are forwarded to the appropriate Assistant Chief Counsel.

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7. The date on which the Assistant Chief Counsel forwards a case to a supervisor for assignment to a professional employee for preparation of a long-form decision.
8. The date the professional employee is assigned the case.
9. The date that the professional employee actually starts working on an assigned case.
10. The date the professional employee gives a draft decision to a clerical for typing.
11. The date on which the supervisor receives the draft decision. [After receipt of the draft the supervisor reviews the proposed substantive decision.]
12. The date the supervisor forwards a draft decision to the appropriate Assistant Chief Counsel.
13. The date on which cases which cannot be processed for varying reasons, e.g., involve a policy or legal issue as yet unresolved by the Members, are placed in the "abeyance record." (Note: printed production logs still in use call this step "forward to Chief Counsel." The Chief Counsel position has been vacant since January 1985 and no substantive review takes place at this step.)
14. The date on which a proposed decision is forwarded to the Director of Case Management. The Director of Case Management is responsible for monitoring and managing the flow of cases and proposed decisions to the Members and for coordinating their review among the Members' offices. Draft decisions are reviewed at this level only for policy implications. There is not a substantive review of the draft decision at this stage. At times in the past some cases were held in abeyance at this stage; at present any case that is in abeyance is shown at step 13.
15. The date on which the proposed decision is forwarded to the Members by the Director of Case Management.
16. Date the decision issues.

This method of case tracking is still in use at the FLRA today.



Federal Labor Relations Authority

Washington, D.C. 20424

IMMEDIATE RELEASE

October 1, 1985

AUTHORITY COMPLETES MOST PRODUCTIVE YEAR EVER

The Federal Labor Relations Authority in Fiscal Year 1985 closed the largest number of cases ever in a single year, Acting Chairman Henry B. Frazier III, announced today. Between October 1, 1984 and September 30, 1985, the Authority closed 822 cases thereby reducing the number of pending cases from 737 at the beginning of the fiscal year to 460 at the end. This reduction was accomplished even though 545 new cases were filed with the Authority during the same period.

According to Frazier, "This continues the trend which was begun in the previous fiscal year when the Authority closed 750 cases. In addition to having just completed our best year ever, during FY '85 we also had our best first quarter of any fiscal year when we closed 211 cases and our best quarter of any quarter ever, when, during the third quarter, we closed 268 cases. The production during the first quarter gave us a head start on the year and the tremendous effort during the remainder of the year pushed us over the top. This accomplishment enabled the agency to exceed its goal of closing 780 cases, a goal which was established during the development of agency objectives before the year began."

"I believe the Authority is at long last reaching the point where cases can be assigned and work can begin on them immediately after all documents have been filed by the parties. I hope that the elimination of so much of the older case backlog will enable us now to develop a smoothly functioning process so that cases will move in a steady stream through the Authority and decisions will issue in less time than in the past. I attribute this outstanding achievement to dedication and hard work of everyone at the Authority," Frazier said.

Frazier added, "Over the past couple of years we have made every effort to increase the efficiency and productivity of the agency through a series of management improvement initiatives involving personnel in every aspect of our operations. Among these initiatives were organizational changes and the elimination and/or compressing of levels of review; increasing the availability of electronic legal research tools; utilizing special 'task forces' to concentrate on the resolution of older cases; standardization of the format of decisions to the maximum extent; refinement of the computerized case tracking system, including increasing the capability of our automated

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data base, to permit the early identification and resolution of case processing problems and to enhance the overall management of the caseload and the allocation of resources; and additions of word processing equipment and improvements in its use. Furthermore, many cases are being processed faster than in the past because they can be resolved on the basis of the extensive precedent developed during the first five years of the Authority's existence. But, the most important factor has been the renewed determination of personnel at all levels within the agency to eliminate the 'backlog' so that all cases can be actively processed through the case management system on a timely and current basis."

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STATISTICS REQUESTED BY SENATOR STEVENS WITH RESPECT TO UNFAIR
LABOR PRACTICE AND ARBITRATION CASES:

Senator Stevens requested information on the rate at which Member Frazier voted to reverse proposed decisions of ALJ's when he served as Acting Chairman as compared with the rate when he served only as a Member:

<u>Period of Time</u>	<u>Rate^{1/}</u>
January 1979-August 1984----- while serving as a Member	9%
September 1984-December 1985----- while serving as Acting Chairman	18%
December 1985-June 30, 1986----- while serving as a Member	14%

Senator Stevens requested information on the rate at which Member Frazier voted to sustain exceptions to arbitration awards when he served as Acting Chairman as compared with the rate when he served only as a Member:

<u>Period of Time</u>	<u>Rate^{2/}</u>
January 1979-August 1984----- while serving as a Member	11.5%
September 1984-December 1985----- while serving as Acting Chairman	29.2%
December 1985-June 30, 1985----- while serving as a Member	27.9%

1/ The rates are also the rates at which the FLRA as an agency has actually reversed proposed decisions of ALJ's. This is so because of the very small number of dissents which have been issued when a full complement of three Members have been on board and because of the extended periods of time when only two Members have been on board.

2/ These rates are also the rates at which the FLRA as an agency has actually granted exceptions to arbitration awards. This is so because of the very small number of dissents which have been issued when a full complement of three Members have been on board and because of the extended periods of time when only two Members have been on board.

- 2 -

I asked the Supervisory Attorney in charge of the Arbitration Division to analyze the rates with respect to arbitration awards and provide me with an explanation. He responded with the following written explanation:

The Number of Arbitration Awards Found Deficient in FY 85:
An Explanation

The comparatively large number of awards found deficient in FY 85, both in absolute and percentage terms, is seemingly a statistical aberration that was primarily the result of the focus and efforts in FY 84 of an emergency special task force and its successor the arbitration team. In November 1983 to respond to the serious problem of the growing inventory of pending arbitration cases before the Authority, the Authority established a special task force as an emergency measure to expedite the processing of arbitration cases. In conjunction with the task force, the Authority also developed other procedures to expedite the processing of cases to include an abbreviated format decision for the denial of exceptions where it was clear under established precedent that the exceptions failed to establish that the award was deficient. The abbreviated decision was intended to eliminate the time and effort involved in the preparation and review of detailed decisions denying clearly unmeritorious exceptions. Because these procedures were most effective in expeditiously processing cases in which exceptions could be denied by use of the format decision, the focus of the special task force was on reviewing the entire inventory of pending arbitration cases in order to select for consideration those cases which seemed appropriate for that manner of processing. After the conclusion of the task force in March 1984, this new approach to processing arbitration cases in which exceptions could be denied by use of the format decision was continued by the Authority in the form of the arbitration team process.

As the case statistics show, these efforts resulted in the considerable achievement in FY 84 of the closing of 222 cases by denial of the exceptions. At the same time, however, due to the focus of those efforts on processing those cases in which exceptions could be denied, many cases in which the preliminary review indicated that the award was likely deficient were as part of the emergency measures set apart for later processing. That later processing of these cases resulted in many of these cases being decided and issued in FY 85 with the decision being that the award was deficient. Under ordinary case processing procedures,

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many of these cases would have been decided and issued in FY 84. These cases would not have been set apart in FY 84 for later processing, but instead would routinely have been processed generally in order of their filing date.

Because of those events, it seems a more accurate statistical approach to FY 84 and FY 85 would be to combine the case statistics and view them in combination. Such an approach results in a total closing of 596 cases of which 118 cases found the award deficient. In percentage terms this results in less than 20% of the awards having been found deficient which is very close to the historical average of the Authority in this respect.

MATERIAL REQUESTED BY SENATORS STEVENS AND EAGLETON CONCERNING
THE ALLEGATION OF MEMBER MCGINNIS THAT HE WAS UNAWARE THAT
CASES WERE BEING HELD IN ABEYANCE:

When I became Acting Chairman of the FLRA on September 1, 1984, there were 88 cases already in abeyance. It was staff practice at that time that if a lead case was before the Members for decision, other cases presenting the same issue would be put into abeyance until the Members reached agreement on the lead case in order to devote the agency's limited resources to the processing of the cases on which agreement had been or could be reached. So long as the lead case remained undecided or if it became deadlocked (i.e., a tie 1-1 vote when there were only two members on the Authority), the other like cases remained in abeyance. If agreement was never reached, the case had to await the appointment of a third Member. Several other categories of cases were put into abeyance: (1) cases wherein the Authority was awaiting a decision of the Supreme Court or the Court of Appeals on the same issue as that presented in the abeyance cases; and (2) cases where the union had filed two types of cases concerning the same issue, a negotiability case and an unfair labor practice case, and under the FLRA's rules the union had directed the processing of one of the two, the second would be put into abeyance. Consequently, the actual number of cases held in abeyance fluctuated over a period of time.

Soon after Member McGinnis assumed office he was presented with some background materials on the status of operations at the FLRA. Among those materials was a two volume Source Book prepared by the Office of the Solicitor. In the Source Book were several memoranda dealing with key issues pending in lead cases before the Authority Members together with listings of other cases in the agency which presented the same issue as the lead case and which had not been put before the Members pending resolution of the basic issue on the lead case. At TAB C of Volume II was a Memorandum on the subject: "Background Materials Relating to the Issue of the Negotiability of Travel and Per Diem Expenses," January 14, 1985. That Memorandum explains that the issue is pending before the Authority Members in case O-NG-293 and states, in pertinent part, that

a number of other cases [in addition to O-NG-293] involving the negotiability of travel and per diem expenses are pending before the Authority. A list of those cases, as identified by the Office of Chief Counsel, is set forth in Attachment 13.

Similarly, at TAB D of Volume II, in a Memorandum on Subject: "The Standard for Determining the Duty to Bargain Over

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'Appropriate Arrangements' Under Section 7106(b)(3).'" January 14, 1985, the Solicitor's Office pointed out that the "negotiability staff has identified . . . 14 cases, including O-NG-364, that are currently at step 14 in the casehandling process." At TAB E of Volume II was a Memorandum concerning the "Development of the de minimis test in unfair labor practice cases involving the statutory duty to bargain." Further, in an Addendum to Volume II there is a section entitled "Cases Which Present Policy Questions on Which Members Have Not Reached Agreement" which shows five such categories of cases, including "Cases involving de minimus [sic] test." (See documents from Source Book attached.)

On June 12, 1985, Acting Chairman Frazier and Member McGinnis, accompanied by their Executive Assistants, Holly Hemphill and Mark Rosenbaum, respectively, attended a briefing on case processing presented by members of the staff. Harold Kessler, the Managing Director for Case Processing led off with a report which included the numbers and types of cases being held in abeyance. He noted among the types of abeyance cases were cases concerning "(b)(3) excessive interference." The Acting Chairman asked for a list of cases in abeyance and the issues involved in each case. Associate Chief Counsel Stuart Horn reported regarding abeyance cases that 35 had "(b)(3) appropriate arrangements" issues. (See Memorandum for Record attached.)

On July 22, 1985 and on August 5, 1985, Harold Kessler, Managing Director for Case Processing sent Memoranda to Acting Chairman Frazier and Member McGinnis on the Subject: "July Forwarding of Step 11 and 12 cases." In those Memoranda Mr. Kessler identified by case number, those cases being held in abeyance. (Copies attached.)

Finally, in a memorandum supplementing his remarks made at the FLRA's budget hearing held on October 3, 1985, which was an enclosure to an October 9, 1985 letter which he sent to OMB, Member McGinnis himself stated: "Also there are about 50 cases which are being held in abeyance because Mr. Frazier and I are deadlocked over their resolution. However, alternative drafts have been completed; and, all that is necessary is that another Member be appointed and agree with one of us. Additionally, there are 46 other cases which are being held in abeyance for various reasons most of which do not require extensive drafting."

Attachments

Source Book

Prepared by the
Office of the Solicitor

Volume II

- A. Summary of litigation involving action by the Authority on requests that it stay an arbitration award under 5 C.F.R. § 2429.8 (1984)
- B. Summary of litigation involving allegations of unreasonable delays in case processing by the Authority
- C. Background materials relating to the issue of the negotiability of travel and per diem expenses
- D. The standard for determining the duty to bargain over "appropriate arrangements" under section 7106(b)(3)
- E. Development of the de minimis test in unfair labor practice cases involving the statutory duty to bargain
- F. "Bypass" as an unfair labor practice under the Statute

MEMORANDUM

JAN 14 1985

TO: MEMBERS OF THE AUTHORITY

FROM: Ruth E. Peters
SolicitorSUBJECT: The standard for determining the duty to bargain over
"appropriate arrangements" under section 7106(b)(3)

This memorandum sets forth the background on the issue of the standard to be applied in determining the duty to bargain over a proposal that a union contends is a negotiable "appropriate arrangement" under section 7106(b)(3) of the Statute.

A. The statutory duty to bargain

Under the Statute, the duty to bargain extends to conditions of employment --that is, personnel policies, practices and matters affecting working conditions of unit employees. 5 U.S.C. § 7103(a)(14). However, the duty to bargain does not extend to matters proposed for bargaining which are, *inter alia*, inconsistent with federal law or government-wide rules or regulations. 5 U.S.C. § 7117. Section 7106(a) of the Statute sets forth certain management rights concerning which agencies may not bargain. Section 7106(b)(1) sets forth certain matters--for example, the "technology, methods, and means of performing work"--over which an agency may bargain if it elects to do so. Section 7106(b)(2) provides that nothing in section 7106 shall preclude bargaining over "procedures which management officials of the agency will observe in exercising any authority under this section" (emphasis added). Further, section 7106(b)(3) provides that nothing in section 7106 shall preclude bargaining over "appropriate arrangements for employees adversely affected by the exercise of any authority under this section by such management officials" (emphasis added).

B. The D.C. Circuit's decision in AFGE Local 2782

Before the D.C. Circuit issued its decision in American Federation of Government Employees, AFL-CIO, Local 2782 v. FLRA, 702 F.2d 1183 (D.C. Cir. 1983) (Attachment 1), the Authority employed the "direct interference" test to determine whether a bargaining proposal described by a union as a "procedure" under section 7106(b)(2) was negotiable, or whether a union proposal proffered as an "appropriate arrangement" under section 7106(b)(3) was negotiable. That is, a proposal proffered either as a "procedure" or as an "appropriate arrangement," but which the Authority determined would "directly interfere" with the exercise of management's substantive rights, was accordingly determined to be nonnegotiable. The Authority applied the "direct interference" test

in O-NG-352,^{1/} the Authority case underlying the D.C. Circuit's decision in AFGE Local 2782 v. FLRA. In that case, the union alleged that the following proposal regarding the selection of repromotion eligible employees was an "appropriate arrangement" under section 7106(b) (3):

Section 5. Notwithstanding any other provision of this article, a repromotion eligible (i.e., an employee demoted through no fault of his or her own) will be selected for the first available vacancy for which he or she fully meets the qualification standards and which the agency determines to fill.

The Authority held the union's proposal nonnegotiable since the proposal, by mandating selection of a particular employee, would directly interfere with the exercise of management's rights under section 7106(a) (2) (C) to select among candidates from any appropriate source in filling a vacancy.

On review of the Authority's decision in O-NG-352, the D.C. Circuit rejected the Authority's application of the direct interference test to appropriate arrangements questions. The court (Scalia, J.) noted that the D.C. Circuit had approved the direct interference test in Department of Defense v. FLRA, 659 F.2d 1140 (D.C. Cir. 1981), cert. denied, 455 U.S. 945 (1982), but that the Authority determinations under review in that case involved issues regarding what constitutes negotiable "procedures" under section 7106(b) (2). 702 F.2d at 1186. The direct interference test or a variant of it is often used to distinguish "procedure" from "substance," the court said, and thus the test as applied to section 7106(b) (2) did not deprive the Statute of all its meaning. Ibid. However, the direct interference test as applied to appropriate arrangements issues would deprive section 7106(b) (3) of its meaning, the court indicated, since under those circumstances section 7106(b) (3) would appear to be entirely duplicative of section 7106(b) (2). Ibid.

The court held, therefore, that "the Authority cannot find a union proposal regarding adversely affected employees to be nonnegotiable simply because the proposal envisions some constraints" upon management rights. 702 F.2d at 1188. The court also stated that "the broad limiting word 'appropriate' allows the Authority to effect 'needful limitations' (702 F.2d at 1187), and that '[u]ndoubtedly, some arrangements may be inappropriate because they impinge upon management prerogatives to an excessive degree.'" 702 F.2d at 1188 (emphasis in original). The court thus remanded the case to the Authority to determine whether the union proposal was an appropriate arrangement. Ibid.

^{1/} American Federation of Government Employees, AFL-CIO, Local 2782 and Department of Commerce, Bureau of Census, Washington, D.C., 7 F.L.R.A. 91.

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On remand, the Authority applied the D.C. Circuit's "excessive interference" test as required by the court's order and determined in a decision issued on May 11, 1984, that the proposal did not interfere with the exercise of management rights to an excessive degree (Attachment 2). However, the Authority held that the proposal was nevertheless nonnegotiable because it was inconsistent with government-wide regulations regarding management's right to select from a group of best qualified candidates or from any other appropriate source.^{2/}

C. Subsequent D.C. Circuit decisions

The D.C. Circuit has applied its decision in AFGE Local 2782 v. FLRA, to two other cases. In Association of Civilian Technicians, Montana Air Chapter v. FLRA, No. 83-1489 (D.C. Cir. Aug. 1, 1983) (Attachment 3) the court summarily reversed the Authority's determinations on two proposals regarding RIF'd employees in Authority Case No. O-NG-387, issued as 11 FLRA No. 88. The Authority had determined that the two proposals, alleged by the union to be "appropriate arrangements" under section 7106(b)(3) directly interfered with the exercise of management rights.^{3/}

In Local 32, AFGE, AFL-CIO v. FLRA, 728 F.2d 1526 (D.C. Cir. 1984) (Attachment 4), the court, in an opinion written by Judge Fairchild of the Seventh Circuit, noted that one proposal regarding repromotion eligible employees in that case was "nearly identical" to the proposal in AFGE Local 2782 v. FLRA. The court found a remand to be unnecessary in Local 32, since the proposal in that case would permit management to pass over the repromotion eligible if management has "persuasive reasons" for doing so. 728 F.2d at 1530. That proviso, the court stated, would make it difficult to claim that the proposal "would infringe upon management prerogatives to an excessive degree." Ibid. (footnote omitted.) Accordingly, the court reversed the Authority's decision as it pertained to that proposal, and remanded it to the Authority for entry of a bargaining order.^{4/}

^{2/} The union requested, and the Authority granted, reconsideration in O-NG-352 on the issue of whether the union proposal is inconsistent with a government-wide rule or regulation; a draft decision on this issue is currently before the Members.

^{3/} The negotiability staff has informed us that a draft decision on those two proposals, finding them to be inconsistent with the National Guard Technicians Act, is being forwarded to the Members.

^{4/} The Authority issued its order on remand on July 10, 1984 (Attachment 5).

D. The Eleventh Circuit's decision
in Robins Air Force Base

A recent Eleventh Circuit decision (United States Air Force, Headquarters, Warner Robins Air Force Logistics Command, Robins Air Force Base, Georgia v. FLRA, 727 F.2d 1502 (11th Cir. 1984) (Attachment 6)), also involved the "appropriate arrangements" issue. In the Authority decision (8 F.L.R.A. 667) under review in that case, the Authority found the following proposal negotiable:

Employee Utilization

Section E. It is recognized that part-time employees are essential in carrying out the mission of the Employer; however, full-time employees will be utilized to the fullest extent possible. Part-time employees will be utilized only when it is not practical nor prudent to use full-time employees.

On review, the Eleventh Circuit refused to enforce the Authority's decision. The court found that "[g]iven the clear language of [section 7106 of] the Statute and the clear effect of the proposal . . . the only logical conclusion in this case is that the proposal is not bargainable" (footnote omitted). 727 F.2d at 1505-1506. In particular, the court noted that "[t]o the extent that the FLRA concluded that the proposal is an 'appropriate arrangement,' we hold that no reasonable basis supports that decision. Subsection [7106](a) clearly states that the agency retains the authority to determine the 'personnel by which agency operations shall be conducted' and to hire and fire employees. If this proposal is negotiable as an appropriate arrangement, we cannot envision what would remain for the agency to determine under subsection (a)" [footnote omitted]. 727 F.2d at 1504-1505.

In a memorandum (Attachment 7) recommending against seeking rehearing of the Eleventh Circuit case, the Solicitor's Office noted the 11th Circuit decision is in apparent conflict with the D.C. Circuit's decision in AFGE Local 2782. The Eleventh Circuit approved the Authority's use of a "direct interference" standard, but disagreed with the Authority's application of the standard to the proposal in that case. Thus, although the Eleventh Circuit cited AFGE Local 2782 approvingly, it appeared to apply a test that was rejected by the D.C. Circuit as "contrary to law." The Solicitor's Office recommended in view of the confusion likely to result from this apparent disagreement between the two courts, that the Authority clearly explicate its view, in a suitable negotiability proceeding, as to what standard the Authority will apply in resolving "appropriate arrangements" issues.

The issue of the standard to be applied in section 7106(b)(3) cases was presented for discussion at an Authority agenda on Case No. O-NG-364 on July 25 and 26, 1984). In an agenda briefing memo (Attachment 8) to the Members, the negotiability staff articulated

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the three apparent options available to the Authority: (1) the "excessive interference" approach of the D.C. Circuit in AFGE Local 2782; (2) the "direct interference" test as applied by the Authority in its decisional precedent; (3) the "direct interference" test as applied by the Eleventh Circuit in Robins Air Force Base. The negotiability staff has identified (see Attachment 9) 14 cases, including O-NG-364, that are currently at step 14 in the casehandling process.

Attachments

Pending cases involving 7106(b)(3) issues

January 10, 1985

NUMBER: 00364

NUMBER: 00445

NUMBER: 00501

NUMBER: 00589

NUMBER: 00594

NUMBER: 00628

NUMBER: 00723

NUMBER: 00874

NUMBER: 00917

NUMBER: 00920

NUMBER: 00933

NUMBER: 956

NUMBER: 00999

NUMBER: 01030

MEMORANDUM

TO: MEMBERS OF THE AUTHORITY

FROM: Steven H. Svartz
Deputy SolicitorSUBJECT: Background Materials Relating to the Issue of the
Negotiability of Travel and Per Diem Expenses

Section 7131 of the Statute (Attachment 1) is entitled "Official time." Under section 7131(a), federal agencies are required to grant official time to employees representing their union in collective bargaining with the agencies. The grant of official time allows the employee negotiators to be paid as if they were at work, whenever they bargain during hours they would otherwise be on duty. Bureau of Alcohol, Tobacco and Firearms v. FLRA, 104 S. Ct. 439 (1983) ("BATF") (Attachment 2).

In BATF, the Supreme Court rejected the Authority's conclusion that the grant of official time under section 7131(a) also entitles employee union representatives to a per diem allowance and reimbursement for travel expenses incurred in connection with collective bargaining.^{1/}

^{1/} The Supreme Court's decision resolved a split in the courts of appeals: the Ninth Circuit had sustained the Authority's position (672 F.2d 732 (9th Cir. 1982) (Attachment 3)), while three other courts of appeals had rejected the Authority's construction. Florida National Guard v. FLRA, 699 F.2d 1082 (11th Cir. 1983), cert. denied, 104 S. Ct. 524 (1983) (Attachment 4); Department of Agriculture v. FLRA, 691 F.2d 1242 (8th Cir. 1982), cert. denied, 104 S. Ct. 523 (1983) (Attachment 5); and Division of Military and Naval Affairs, State of New York v. FLRA, 683 F.2d 45 (2d Cir. 1982), cert. denied, 104 S. Ct. 523 (1983) (Attachment 6).

Four other cases have addressed section 7131 of the Statute in contexts other than the issue of travel and per diem expenses. American Federation of Government Employees v. FLRA, No. 82-1272 (D.C. Cir. Dec. 21, 1984) (rejecting the Authority's conclusion that section 7131(a) does not apply to the negotiation of a local agreement which supplements a national (master) agreement) (Attachment 7); American Federation of Government Employees, Local 1592 v. FLRA, 744 F.2d 73 (10th Cir. 1984) (affirming the Authority's holdings that section 7131(a) does not extend official time to non-bargaining unit employees who choose to serve as negotiators for the unit) (Attachment 8); American Federation of Government Employees, Local 2096 v. FLRA, 738 F.2d 633 (4th Cir. 1984) (affirming the Authority's holdings that section 7131(a) does not extend official time to, and section 7131(d) does not impose on an agency a duty to bargain over providing official time to, non-bargaining unit employees who choose to serve as negotiators for the unit) (Attachment 9); and National Federation of Federal Employees Local 1451 v. FLRA, 652 F.2d 191 (D.C. Cir. 1981) (affirming the Authority's determination that an agency has no duty to bargain over the number of representatives management shall designate for collective bargaining) (Attachment 10).

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In footnote 17 of its opinion, the Supreme Court stated, among other things, that its "conclusion that federal agencies may not be required under § 7131(a) to pay the travel expenses and per diem allowances of union negotiators does not, of course, preclude an agency from making such payments upon a determination that they serve the convenience of the agency or are otherwise in the primary interest of the government"; and that "unions may presumably negotiate for such payments in collective bargaining as they do in the private sector." Id. at 444 n.17.

At the time of the Supreme Court's decision in BATF, the Authority's decision in Case No. O-NG-293, 9 FLRA 629 (Attachment 11) was pending on review before the U.S. Court of Appeals for the District of Columbia Circuit. In that decision, the Authority had found negotiable a proposal which provided: "The employer agrees to pay the travel expenses incurred by employees while using official time available under the terms of the agreement." The basis for that decision was the specific ground subsequently rejected by the Supreme Court, that is, the asserted entitlement of employee union representatives to travel and per diem expenses while on official time under section 7131(a) of the Statute.

Accordingly, after the Supreme Court's decision in BATF, the Authority requested the D.C. Circuit to remand the case to enable the Authority to consider the effect of BATF on the question of whether the proposal in O-NG-293 is negotiable. The D.C. Circuit granted the remand, and, pursuant to the Authority's request, the parties in O-NG-293 submitted statements of position on the negotiability of the proposal. The positions of the parties in O-NG-293, which is pending before the Authority, are set forth in a memorandum prepared by the Office of Chief Counsel (Attachment 12).^{2/}

Also after the Supreme Court's decision in BATF, the Office of Personnel Management published Federal Personnel Manual (FPM) Letter 711-162 (January 19, 1984) (Attachment 14). Among other things, the FPM Letter stated that the Court's statement in footnote 17 concerning the negotiability of travel and per diem expenses was "dictum," and the "footnote does not establish an obligation or authorization to bargain over travel and per diem payments for employee union negotiators."

Attachments

^{2/} In addition to O-NG-293, a number of other cases involving the negotiability of travel and per diem expenses are pending before the Authority. A list of those cases, as identified by the Office of Chief Counsel, is set forth in Attachment 13.

ATTACHMENT 13

PENDING CASES IDENTIFIED BY THE OFFICE OF
CHIEF COUNSEL INVOLVING THE NEGOTIABILITY
OF TRAVEL AND PER DIEM EXPENSES

National Treasury Employees Union and Department of the Treasury,
U.S. Customs Service, Case No. O-NG-293

American Federation of Government Employees, National EPA Council
and Environmental Protection Agency, Case No. O-NG-678

American Federation of Government Employees, Local 3488, AFL-CIO,
and Federal Deposit Insurance Corporation, New York Region, Case
No. O-NG-703

National Federation of Federal Employees, Local 1309 and U.S.
Department of the Interior, U.S. Geological Survey, Eastern Mapping
Agency, Case No. O-NG-746

National Federation of Federal Employees, Local 1309 and U.S.
Department of the Interior, U.S. Geological Survey, Eastern Mapping
Agency, Case No. O-NG-748

American Federation of Government Employees, AFL-CIO, Council 214
and Air Force Logistics Command, Wright-Patterson Air Force Base,
Ohio, Case No. O-NG-786

National Association of Agriculture Employees (NAAE) and U.S.
Department of Agriculture, Animal and Plant Health Inspection
Service, Case No. O-NG-1028

American Federation of Government Employees, AFL-CIO, National
Council of Federal Grain Inspection Locals, and U.S. Department of
Agriculture, Federal Grain Inspection Service, Case No. O-NG-1034

American Federation of Government Employees, AFL-CIO, Local 1458 and
U.S. Department of Justice, Office of the U.S. Attorney, Southern
District of Florida, Case No. O-NG-1058

Food Safety and Inspection Service, U.S. Department of Agriculture
and National Joint Council of Food Inspection Locals, American
Federation of Government Employees, AFL-CIO, Case No. O-NG-1061

JAN 15 1995

MEMORANDUM

TO: MEMBERS OF THE AUTHORITY

FROM: Ruth E. Peters *REP*
SolicitorSUBJECT: Development of the de minimis test in unfair labor practice cases involving the statutory duty to bargain

This memorandum discusses the development of the de minimis test for determining whether an agency, in exercising a right reserved to management under section 7106 of the Statute, has a duty to notify the exclusive bargaining representative and to engage in impact and implementation bargaining upon request.

Under Executive Order 11491, a "substantial impact" test was employed to evaluate the duty to "meet and confer" with the bargaining representative under section 11(a) of the Executive Order.^{1/} See, e.g., Social Security Administration Bureau of Hearings and Appeals and American Federation of Government Employees,

1/ Sections 11(a) and (b) of the Executive Order provided:

SEC. 11. Negotiation of agreements. (a) An agency and a labor organization that has been accorded exclusive recognition, through appropriate representatives, shall meet at reasonable times and confer in good faith with respect to personnel policies and practices and matters affecting working conditions, so far as may be appropriate under applicable laws and regulations, including policies set forth in the Federal Personnel Manual, published agency policies and regulations, a national or other controlling agreement at a higher level in the agency, and this Order. They may negotiate an agreement, or any question arising thereunder; determine appropriate techniques, consistent with section 17 of this Order, to assist in such negotiation; and execute a written agreement or memorandum of understanding.

(b) In prescribing regulations relating to personnel policies and practices and working conditions, an agency shall have due regard for the obligation imposed by paragraph (a) of this section. However, the obligation to meet and confer does not include matters with respect to the mission of an agency; its budget; its organization; the number of employees; and the numbers, types, and grades of positions or employees assigned to an organizational unit, work project or tour of duty; the technology of performing its work; or its internal security practices. This does not preclude the parties from negotiating agreements providing appropriate arrangements for employees adversely affected by the impact of realignment of work forces or technological change.

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Local 3615, 2 FLRA 238 (1979); Department of Defense, Air National Guard, Texas Air National Guard, Camp Mabry, Austin, Texas, 6 A/SLMR 591 (1976). In Camp Mabry the Assistant Secretary stated (*id.* at 592):

In my view [section 11(a)] is not intended to embrace every issue which is of interest to agencies and exclusive representatives and which indirectly may affect employees. Rather, section 11(a) encompasses those matters which materially affect, and have a substantial impact on, personnel policies, practices, and general working conditions.

In a case arising under the Statute,^{2/} the Authority affirmed an ALJ decision in which the ALJ applied the "substantial impact" test and found that the agency in that case was not required to give the union notice and opportunity to bargain over "appropriate arrangements" for adversely affected employees under section 7106(b)(3) when the agency temporarily assigned an employee to a supervisory position.

In a subsequent decision, U.S. Government Printing Office and Joint Council of Unions, GPO, 13 FLRA No. 39 (1983) (Attachment 2), the Authority concluded in agreement with the ALJ that GPO had not met its statutory duty to bargain over the impact and implementation of a reorganization. The Authority stated that

[i]n so concluding, the Authority emphasizes that where an agency in exercising a management right under section 7106 of the Statute, changes conditions of employment of unit employees as here [footnote omitted], the statutory duty to negotiate comes into play if the change results in an impact upon unit employees or such impact was reasonably foreseeable. In such circumstances, where an agency exercises a management right but has failed to provide adequate prior notice thereof to the exclusive representative of its employees or has rejected a timely request for negotiations pursuant to section 7106(b)(2) and (3) of the Statute, the agency will be found to have violated section 7116(a)(1) and (5) of the Statute.^{4/}

^{4/} This is not to say that an agency is required to notify the exclusive representative of its employees every time it decides to exercise a management right under section 7106 of the Statute. Thus, where the exercise of a management right has not changed conditions of employment so as to have an impact on bargaining unit employees and such impact cannot reasonably be foreseen, management's failure to have provided prior notice thereof to the exclusive representative will not be found to have violated section 7116(a)(1) and (5) of the Statute. See, e.g., Office of Program Operations, Field Operations, Social Security Administration, San Francisco Region, 5 FLRA No. 45 (1981).

^{2/} Office of Program Operations, Field Operations, Social Security Administration, San Francisco Region, and Council of District Office Locals, American Federation of Government Employees, San Francisco Region, 5 FLRA 533 (1981) (Attachment 1).

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The Authority, citing its decision in U.S. Government Printing Office, noted in a subsequent decision^{3/} that it had not adopted the "substantial impact" test that had been enunciated under Executive Order 11491.

In a recent decision,^{4/} the Authority articulated the de minimis test. The Authority stated that in U.S. Government Printing Office, it had rejected the "substantial impact" test. The Authority further stated that "[i]n doing so, however, the Authority also indicated and now specifically reiterates that no duty to bargain arises from the exercise of a management right that results in an impact or a reasonably foreseeable impact on bargaining unit employees which is no more than de minimis." In 13 FLRA No. 174, a practice had existed for a claims representative who initiated and adjudicated a claim to transpose the claims information onto a computer input form. The same claims representative who entered that information could also review a computer printout of the information for verification procedures. The agency changed that practice to require that the review be conducted by someone other than the person who authorized the computer input. The Authority, applying the de minimis test, agreed with the ALJ that the agency had no statutory duty to provide the union with notice and the opportunity to bargain.

The Authority has applied the de minimis test in subsequent decisions.^{5/} Currently before the Authority members are draft decisions in other cases which involve the issue of how the de minimis test should be interpreted -- i.e., what constitutes an impact (or reasonably foreseeable impact) on conditions of employment that is either de minimis, or more than de minimis -- and how the test should be applied to the facts of particular cases.

3/ Internal Revenue Service (District, Region, National Office Unit) and National Treasury Employees Union, 13 FLRA No. 61 (1983) (Attachment 3).

4/ Department of Health and Human Services, Social Security Administration, Chicago Region and American Federation of Government Employees, AFL-CIO, 15 FLRA No. 174 (1984) (Attachment 4).

5/ E.g., Social Security Administration and American Federation of Government Employees, AFL-CIO, 16 FLRA No. 17 (Sept. 26, 1984); Internal Revenue Service, Washington, D.C., and Fresno Service Center, Fresno, California, and National Treasury Employees Union, 16 FLRA No. 23 (Sept. 28, 1984).

Cases Which Present Policy Questions on Which Members Have
Not Reached Agreement

1. Cases involving de minimus test
2. Case involving bypass issue
3. Miscellaneous ULP cases
4. Miscellaneous Negotiability cases
5. Miscellaneous Arbitration Cases

MEMORANDUM FOR RECORD

SUBJECT: Briefing on Cases Held in Abeyance

On June 12, 1985, Messrs. Frazier and McGinnis, accompanied by me and Mark Rosenbaum, respectively, attended a briefing on case processing presented by members of the staff.

Harold Kessler led off with a report which included the numbers and types of cases being held in abeyance. He noted among the types of abeyance cases were cases concerning "(b)(3) excessive interference." Mr. Frazier asked for a list of cases in abeyance and the issues involved in each case.

Stuart Horn later reported regarding abeyance cases that 35 had "(b)(3) appropriate arrangements" issues. It was agreed that he would look for a good case for the Authority to decide based on the "excessive interference" test so as to set up a possible split in the Circuits which might then lead to Supreme Court resolution of the issue.

A typed excerpt from my handwritten notes, which were taken at the briefing, is attached.

HKH 10/31/85

Holly K. Hemphill

Attachment

CASE PROCESSING BRIEFING

6-12-85

(in attendance:
Frazier/Hemphill; McGinnis/Rosenbaum)

Report by Kessler: Docket at end of May: 609; closed more than received. Of docket 110 or so are awaiting completion of papers or are in abeyance.

--Example of abeyance: Negotiability of travel and per diem; de minimis; (b)(3) excessive interference.

--HBF asks for list of cases in abeyance and issues involved.

S. Horn Reports: Re Cases in Abeyance:

- *--17 negotiability have travel and per diem issues.
- *--35 (b)(3) appropriate arrangements issues
- 4 crediting plan
- 1 FDIC remand
- 1 reconsideration of 15 # 172.

--Stuart will check for good case as candidate for "excessive" interference issue to see if split in circuits likely.

(Excerpt from handwritten notes taken at the briefing by H. Hemphill.)



UNITED STATES OF AMERICA
FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C. 20424

July 22, 1985

MEMORANDUM

TO: Henry B. Frazier III
Acting Chairman

William J. McGinnis, Jr.
Member

FROM: *Harold D. Kessler*
Harold D. Kessler
Managing Director for Case Processing

SUBJ: July Forwarding of Step 11 and 12 Cases

On July 9, the Assistant Chief Counsels were asked for the number of cases at step 11 (group supervisors) and step 12 (Assistant Chief Counsels) and I was instructed that drafts in those cases should be forwarded during the month of July. The total numbers provided were arbitration 43,¹/ negotiability 26 and ULP 48.

Following the instruction, the specific cases were identified and tracking of their progress began. It must be noted however that included in the totals were cases that for various reasons could not be forwarded to the Members. By way of explanation, if a case is put "in abeyance," it is still carried at whatever step it was, but placed in the "abeyance field," but still, for example, at step 11 or 12. When the Assistant Chief Counsels provided the numbers they didn't understand any need to isolate out non-processable cases and when I began to implement the instruction I didn't realize that there was a possible misunderstanding.

Listed on the attached sheets are the cases in the step 11 and step 12 universe as of June 30, and their status as of close of business July 19 (with a few July 22 forwardings included).

In summary, 117 cases were at steps 11 and 12 on June 30. Of that number, 41 cannot currently be processed to the Members. Of the remaining 76, 33 have been forwarded to date (12 arbitration, 3 negotiability, 10 ULP's), with the remainder scheduled to come forward by the end of July. Additionally, 39 cases (14 arbitration, 17 negotiability and 8 ULP) not in the original step 11-12 universe have been forwarded so far this month. By the end of the month the number of these "extra" cases should make up for the cases that could not be forwarded.

¹/George Birch originally provided a number of 32 as he thought the question was the drafts he had and didn't include those with ACC Hardiman

Attachments

ARBITRATION

<u>CASE</u>	<u>STATUS</u>
0-AR-454	Abeyance - Travel & Per Diem
0-AR-495	Abeyance - Travel & Per Diem
0-AR-583	Abeyance - Travel & Per Diem
0-AR-640	Abeyance - Travel & Per Diem
0-AR-672	To be Forwarded
0-AR-717	To be Forwarded
0-AR-770	To be Forwarded
0-AR-791	To be Forwarded
0-AR-802	Forwarded 7/16
0-AR-803	Abeyance - Attorney Fee Awaiting 0-AR-897
0-AR-806	To be Forwarded
0-AR-807	To be Forwarded
0-AR-815	Forwarded 7/18
0-AR-818	To be Forwarded
0-AR-819	To be Forwarded
0-AR-822	Abeyance - Awaiting 0-AP-897
0-AR-825	To be Forwarded
0-AR-835	Abeyance - Awaiting 0-AR-933
0-AR-838	Forwarded 7/16
0-AR-846	Forwarded 7/18
0-AR-886	To be Forwarded
0-AR-893	To be Forwarded
0-AR-894	Forwarded 7/15
0-AR-899	Abeyance - Crediting Plans
0-AR-900	Forwarded 7/16
0-AR-903	To be Forwarded
0-AR-908	Abeyance - Awaiting 0-AR-897
0-AR-913	To be Forwarded
0-AR-916	To be Forwarded
0-AR-919	To be Forwarded
0-AR-921	Forwarded 7/16
0-AR-922	To be Forwarded
0-AR-923	Forwarded 7/10
0-AR-929	To be Forwarded
0-AR-930	To be Forwarded
0-AR-936	Forwarded 7/16
0-AR-940	To be Forwarded
0-AR-943	Forwarded 7/16
0-AR-945	To be Forwarded
0-AR-946	To be Forwarded
0-AR-947	Forwarded 7/10
0-AR-953	To be Forwarded
0-AR-956	Forwarded 7/16

NEGOTIABILITY

<u>CASE</u>	<u>STATUS</u>
0-NG-412	Abeyance - 7106(b)(3)
0-NG-445	Abeyance - 7106(b)(3)
0-NG-546	To be Forwarded
0-NG-547	Abeyance - OPM Reg Test in Court/Congress
0-NG-557	Abeyance - 7106(b)(3)
0-NG-595	To be Forwarded
0-NG-627	To be Forwarded
0-NG-661	To be Forwarded
0-NG-664	Abeyance - Precedential Case on Pay & Fringes
0-NG-680	Abeyance - OPM Reg Test in Court/Congress
0-NG-682	Abeyance - Precedential Case on Pay & Fringes
0-NG-686	To be Forwarded
0-NG-736	Abeyance - Precedential Case on Pay & Fringes
0-NG-759	Abeyance - Precedential Case on Pecuniary Liability
0-NG-823	To be Forwarded
0-NG-845	Abeyance - Precedential Case on Pay & Fringes
0-NG-848	To be Forwarded
0-NG-849	Abeyance - Precedential Case on Work Place Design
0-NG-850	Abeyance - Precedential Case on Work Place Design
0-NG-983	Forwarded 7/11 - Issued
0-NG-985	Abeyance - De Minimis
0-NG-1002	Forwarded 7/3 - Issued
0-NG-1015	Extensive New Filing 7/18 - Won't be Forwarded this Month
0-NG-1022	Forwarded 7/2 - Issued
0-NG-1023	Abeyance - 7106(b)(3)

UNFAIR LABOR PRACTICE

<u>CASE</u>	<u>STATUS</u>
1-CA-853	Abeyance - Awaiting 0-NG-759
1-CA-20262	Forwarded 7/8
1-CA-20322	Abeyance - De Minimis
1-CA-30322	To be Forwarded
12-CA-20179	Forwarded 7/10
2-CA-20364	Forwarded 7/1 - Issued
2-CA-20488	Abeyance - De Minimis
3-CA-664	Forwarded 7/19
3-CA-718	To be Forwarded
3-CA-993	Abeyance - De Minimis
3-CA-1838	Abeyance - Travel & Per Diem
3-CA-20083	Abeyance - De Minimis
3-CA-20489	To be Forwarded
3-CA-30336	To be Forwarded
3-CA-40152	Forwarded 7/11
34-CA-30226	To be Forwarded
34-CA-30615	To be Forwarded
4-CA-30359	Abeyance - De Minimis
4-CA-30515	To be Forwarded
4-CA-30540	Abeyance - De Minimis
4-CA-30630	Abeyance - De Minimis
4-CA-40108	Forwarded 7/10
5-CA-860	Abeyance - De Minimis
5-CA-20083	Forwarded 7/9 - Issued
5-CA-20217	Forwarded 7/9 - Issued
5-CA-30215	Forwarded 7/19
5-CA-30449	Abeyance - De Minimis
5-CA-30366	Forwarded 7/22
6-CA-1041	To be Forwarded
6-CA-30179	Forwarded 7/11
6-CA-30370	To be Forwarded
7-CA-20482	To be Forwarded
7-CA-30399	Abeyance - De Minimis
7-CA-30445	Forwarded 7/10
7-CA-30466	Forwarded 7/10
7-CA-40041	Abeyance - De Minimis
7-CA-40084	Awaiting Arbitration Review
7-CA-40283	To be Forwarded
79-CA-30323	Forwarded 7/22
8-CA-377	Abeyance - De Minimis
8-CA-20416	Abeyance - De Minimis
9-CA-372	Abeyance - De Minimis
9-CA-30009	Forwarded 7/10
9-CA-30148	Forwarded 7/2
9-CA-30238	Forwarded 7/10
9-CA-30242	Abeyance - De Minimis
9-CA-30259	Forwarded 7/16
9-CA-40028	To be Forwarded



UNITED STATES OF AMERICA
FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C. 20424

August 5, 1985

MEMORANDUM

TO: Henry B. Frazier III
Acting Chairman

William J. McGinnis, Jr.
Member

FROM: ~~Harold D. Kessler~~
Managing Director for Case Processing

SUBJ: July Forwarding of Step 11 and 12 Cases

By memo dated July 22, 1985, I transmitted to the Members the cases in the Step 11 and 12 universe of drafts to be forwarded by COB July 31. Listed on the attached sheets is the status of those cases as of that date. Of the total of 74 processable drafts, 66 were forwarded within the time period and 31 of those actually issued. The remaining 8 processable cases (6 arb, 1 nego and 1 ULP) are in the final stages of preparation and will be forwarded within the next 2 weeks. In addition, 47 cases not in the original universe were forwarded during the month of July, bringing to 113 the number of drafts forwarded during the month.

In summary, the figures are as follows:

	Cases in Universe	Cases in Abeance	Processable Cases	Drafts Forwarded	(Issued)	Additional Drafts Forwarded
<u>ARB</u>	43	9	34	28	(16)	22
<u>NEGO</u>	25	16	9	8 ^{1/}	(3)	20
<u>ULP</u>	48	17	31	30 ^{2/}	(12)	5
<u>TOTAL</u>	116	42	74	66		47

^{1/}Includes both O-NG-595 and O-NG-661, which are part of a draft consolidated decision with O-NG-528.

^{2/}Includes 5 drafts forwarded, but being held pending either resolution of applicable precedent, coordination with staff office, or need for additional research.

ARBITRATION

<u>CASE</u>	<u>STATUS</u>
0-AR-454	Abeyance - Travel & Per Diem
0-AR-495	Abeyance - Travel & Per Diem
0-AR-583	Abeyance - Travel & Per Diem
0-AR-640	Abeyance - Travel & Per Diem
0-AR-672	To be Forwarded by 8/13
0-AR-717	Forwarded 7/31
0-AR-770	Forwarded 7/31
0-AR-791	To be Forwarded by 8/6
0-AR-802	Forwarded 7/16 - Issued
0-AR-803	Abeyance - Attorney Fee Awaiting 0-AR-897
0-AR-806	Forwarded 7/23 - Issued
0-AR-807	Forwarded 7/29
0-AR-815	Forwarded 7/18 - Issued
0-AR-818	Forwarded 7/31
0-AR-819	Forwarded 7/31
0-AR-822	Abeyance - Awaiting 0-AR-897
0-AR-825	Forwarded 7/31
0-AR-835	Abeyance - Awaiting 0-AR-933
0-AR-838	Forwarded 7/16 - Issued
0-AR-846	Forwarded 7/18 - Issued
0-AR-886	To be Forwarded by 8/5
0-AR-893	Forwarded 7/23 - Issued
0-AR-894	Forwarded 7/15 - Issued
0-AR-899	Abeyance - Crediting Plans
0-AR-900	Forwarded 7/16 - Issued
0-AR-903	Forwarded 7/23 - Issued
0-AR-908	Abeyance - Awaiting 0-AR-897
0-AR-913	Forwarded 7/31
0-AR-916	Forwarded 7/29
0-AR-919	To be Forwarded by 8/8
0-AR-921	Forwarded 7/16 - Issued
0-AR-922	Forwarded 7/24 - Issued
0-AR-923	Forwarded 7/10 - Issued
0-AR-929	Forwarded 7/24
0-AR-930	To be Forwarded by 8/12
0-AR-936	Forwarded 7/16 - Issued
0-AR-940	To be Forwarded by 8/9
0-AR-943	Forwarded 7/16 - Issued
0-AR-945	Forwarded 7/31
0-AR-946	Forwarded 7/25
0-AR-947	Forwarded 7/10 - Issued
0-AR-953	Forwarded 7/29
0-AR-956	Forwarded 7/16 - Issued

NEGOTIABILITY

<u>CASE</u>	<u>STATUS</u>
0-NG-412	Abeyance - 7106(b)(3)
0-NG-445	Abeyance - 7106(b)(3)
0-NG-546	Forwarded 7/29
0-NG-547	Abeyance - OPM Reg Test in Court/Congress
0-NG-557	Abeyance - 7106(b)(3)
0-NG-595	Forwarded 7/30
0-NG-627	Abeyance - Precedential Case on Scope of Nego determination
0-NG-661	Forwarded 7/30
0-NG-664	Abeyance - Precedential Case on Pay & Fringes
0-NG-680	Abeyance - OPM Reg Test in Court/Congress
0-NG-682	Abeyance - Precedential Case on Pay & Fringes
0-NG-686	Forwarded 7/31
0-NG-736	Abeyance - Precedential Case on Pay & Fringes
0-NG-759	Abeyance - Precedential Case on Pecuniary Liability
0-NG-823	Forwarded 7/31
0-NG-845	Abeyance - Precedential Case on Pay & Fringes
0-NG-848	To be Forwarded by 8/9
0-NG-849	Abeyance - Precedential Case on Work Place Design
0-NG-850	Abeyance - Precedential Case on Work Place Design
0-NG-983	Forwarded 7/11 - Issued
0-NG-985	Abeyance - De Minimis
0-NG-1002	Forwarded 7/3 - Issued
0-NG-1015	Extensive New Filing 7/18 - Won't be Forwarded this Month
0-NG-1022	Forwarded 7/2 - Issued
0-NG-1023	Abeyance - 7106(b)(3)

UNFAIR LABOR PRACTICE

<u>CASE</u>	<u>STATUS</u>
1-CA-853	Abeyance - Awaiting O-NG-759
1-CA-20262	Forwarded 7/8
1-CA-20322	Abeyance - De Minimis
1-CA-30322	To be Forwarded by 8/2
12-CA-20179	Forwarded 7/10 - Issued
2-CA-20364	Forwarded 7/1 - Issued
2-CA-20488	Abeyance - De Minimis
3-CA-664	Forwarded 7/19
3-CA-718	Forwarded 7/31
3-CA-993	Abeyance - De Minimis
3-CA-1838	Abeyance - Travel & Per Diem
3-CA-20083	Abeyance - De Minimis
3-CA-20489	Forwarded 7/23 - Issued
3-CA-30336	Forwarded 7/24 - Issued
3-CA-40152	Forwarded 7/11 - Issued
34-CA-30226	Forwarded to HDK 7/26 - Holding pending additional Research
34-CA-30615	Forwarded 7/31
4-CA-30359	Abeyance - De Minimis
4-CA-30515	Forwarded to HDK 7/26 - Holding pending additional Research
4-CA-30540	Abeyance - De Minimis
4-CA-30630	Abeyance - De Minimis
4-CA-40108	Forwarded 7/10 - Issued
5-CA-860	Abeyance - De Minimis
5-CA-20083	Forwarded 7/9 - Issued
5-CA-20217	Forwarded 7/9 - Issued
5-CA-30215	Forwarded 7/18
5-CA-30449	Abeyance - De Minimis
5-CA-30366	Forwarded 7/22 - Issued
6-CA-1041	Forwarded to HDK 7/23 - Holding pending 3-CD-40003
6-CA-30179	Forwarded 7/11
6-CA-30370	Forwarded to HDK 7/24 - Holding pending 6-CA-40025
7-CA-20482	Forwarded 7/24
7-CA-30399	Abeyance - De Minimis
7-CA-30445	Forwarded 7/10 - Issued
7-CA-30466	Forwarded 7/10
7-CA-40041	Abeyance - De Minimis
7-CA-40084	Awaiting Arbitration Review
7-CA-40283	Forwarded 7/31
79-CA-30323	Forwarded 7/22 - Issued
8-CA-377	Abeyance - De Minimis
8-CA-20416	Abeyance - De Minimis
9-CA-372	Abeyance - De Minimis
9-CA-30009	Forwarded 7/10
9-CA-30148	Forwarded 7/2 - Issued
9-CA-30238	Forwarded 7/10
9-CA-30242	Abeyance - De Minimis
9-CA-30259	Forwarded 7/16
9-CA-40028	Forwarded 7/25

BACKGROUND MATERIAL REQUESTED BY SENATOR EAGLETON CONCERNING
THE FLRA'S CONSIDERATION OF THE QUESTION OF A SEPARATE vs. A
UNITARY STAFF:

The question of separate legal staffs for each Member as opposed to a single unitary staff for the agency has been examined by the Members on several occasions--the most recent being within the last few months after Chairman Jerry Calhoun assumed office.

Going back to the initial decision of the FLRA, the question of separate staffs was seriously considered by the Members of the FLRA primarily because the members of the NLRB have separate staffs. In fact 29 U.S.C. 154 provides in part that "[t]he Board may not employ any attorneys for the purpose of reviewing transcripts of hearings or preparing drafts of opinions except that any attorney employed for assignment as a legal assistant to any Board Member may for such Board Member review such transcripts and prepare such drafts." Therefore, to employ attorneys to assist them, the Board members must use them on individual, separate staffs. The FLRA does not have a comparable provision in its Statute.

The FLRA chose not to copy the NLRB model of separate legal staffs for each member but instead established a single, unitary staff which would provide equal support to and be equally responsive to each Member. This alternative was chosen primarily because of the small size of the authorized agency staff, a limited budget and the shortage of fully qualified professionals who could provide necessary support to each Member in each of the several specialized types of cases we must decide. This alternative has worked reasonably well because the professional staff has remained adequately responsive to each Member. Thus, for example, on a draft case decision which is before the Members for review, one or more Members may have questions which require a response from the staff. Such questions may take the form of concerns about the proposed decision and require further information and a clarification of its meaning or perhaps the drafting of proposed revisions or even a separate opinion. The capacity of the staff to prepare alternate draft decisions on the same case has demonstrated their professionalism and ability to respond to any Member's request.

In hearings on the Civil Service Authorization and Miscellaneous Amendments Act of 1983, the House Subcommittee on Civil Service of the Committee on Post Office and Civil Service raised the question of separate staffs with the Members. I quote from that exchange which should demonstrate clearly that this matter has been examined several times by the Members:

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Mrs. Schroeder. I noticed in the AFGE testimony that they oppose making the Chairperson the chief administrative officer and suggest giving each Authority Member his or her own staff, sort of like clerks to judges. What do you think of this alternative proposal?

Mrs. Mahone. Obviously, that is an area that is constantly subject to discussion with respect to the Federal Labor Relations Authority because our structure is unique from the NLRB structure. At the time that the FLRA was being formed, everyone was aware of the Board's structure. And I have come to the conclusion that it was not the intent of Congress, at that point in time, to develop an organization that was parallel to the Board structure; that is, by statute requiring each of the three members to have independent and separate staffs.

In reviewing why the Federal Labor Relations Authority at the time that it was formed moved to a consolidated staff, I am told that some of the concerns were limited resources and the availability of personnel, as well as a very wise decision being made that we could acquire greater efficiencies and do a much better job in administering the program if we utilized the resources on a collective basis to achieve better economies of scales rather than having three separate staffs.

Mrs. Schroeder. How about your Members' views on that, do you know?

Mr. Frazier. On the question of separate staff?

Mrs. Schroeder. Yes.

Mr. Frazier. Well, I speak from my experience when the agency was established. We did consider the question at that time. As Chairman Mahone said, for reasons of economies of scale, as she put it, we established a single unified staff. We concluded that we didn't have sufficient resources at that time both in terms of numbers and of experience and training to break the existing employees up into three separate staffs so that each Member would have a quality staff to deal with all types of cases that come before the Authority. Unlike the National Labor Relations Board, we do have more than representation and unfair labor practice cases to deal with. We also have the negotiability cases and the exceptions to arbitration awards. For that reason and because the staff tended to specialize in these various areas, we simply didn't have enough people in the several specializations to divide the staff up among the members.

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That was the reason a consolidated staff was established. Whether separate staffs would work any better than a single, unified staff is a hypothetical. I don't know, I suppose we wouldn't know until we tried it.

Mrs. Schroeder. I think the question is, does a unified delay processing cases, the unified staff?

Mr. Haughton. I have considered the concept and have found it attractive in that it would allow for competition between member staffs to get decisions out. However, I came to the conclusion that as a practical matter we don't have the resources to afford what I consider the luxury of separate staffs. It would be very pleasant to have a staff fully qualified reporting to each Member. The fact is we have a limited number of people, so we've gone to what is almost a pool of people. Each Member has the right to go to the staff members in the pool to have his or her own point of view researched.

We've looked at the NLRB's experience with the separate staffs, and after almost 40 years of experience, they do not seem to process unfair labor practice cases any faster than we do. Regardless of the structure, we just have to increase our per person productivity. And I think we can do it with the pool approach.

Finally, as I said the question was reopened after Chairman Calhoun came aboard and the Members decided not to adopt separate staffs.

On July 2 Chairman Calhoun and I together with the Chairman of the Federal Service Impasses Panel sent a letter to all who had submitted suggestions in connection with the FLRA's review of its case processing procedures. The attachment to that letter said:

The FLRA Members have determined that the existing unitary staff structure is appropriate and will be continued.

(Copies were sent to Messrs. Blaylock and Tobias, among others and therefore, it is surprising that my testimony on this point was challenged.)

MATERIAL RELATING TO ALLEGED EX PARTE CONTACT IN CONNECTION
WITH THE PATCO CASE WHICH SENATOR EAGLETON REQUESTED FOR THE
RECORD:

On February 16, 1982, the United States Court of Appeals for the District of Columbia Circuit ordered the Federal Labor Relations Authority "to hold an evidentiary hearing to determine the nature, extent, source and effect of any and all ex parte contacts and other approaches that may have been made to any Member or Members of the Authority while the appeal from the decision of the Administrative Law Judge in case No. 3-CO-105 was pending before the Authority." This case was the unfair labor practice case against PATCO which eventually led to the loss of PATCO's status as a labor organization under the Federal Service Labor-Management Relations Statute. In his report to the Court, the Administrative Law Judge who held the hearing ordered by the Court said, in pertinent part as to the Members' testimony before him:

On the whole, I have found Mr. Frazier's and Mr. Haughton's testimony to be credible. On the other hand, Member Applewhaite's testimony, in substantial parts, was confusing, contradictory, and in some respects incredible. A review of Member Applewhaite's testimony demonstrates his sometimes confusing and contradictory testimony. . . .

With respect to credibility, there are a number of statements by Member Applewhaite which I find difficult to accept.

I should also note that the ALJ also stated that he believed that Mr. Frazier's actions were "based on an honest concern for the decision-making process at the FLRA."

My concern related to communications which a fellow Member had received from the national president of a union. As I testified under oath and I quote from the official transcript of the hearing:

I concluded that in the circumstances I myself should seek the advice of outside counsel, the reason being I felt that in these circumstances the legal problems that might arise could go beyond mere ex parte contact. And I did not feel that it was appropriate for me as a member of the Federal Labor Relations Authority to turn to the Solicitor, who serves all three members and provides legal advice to the members on our obligations under our statute and under our rules and provides advice to us on the meaning and interpretation and application of the statute and rules.

- 2 -

I didn't think it would be appropriate for me to turn to him for advice concerning my responsibility if this were a matter that went beyond ex parte contact and could possibly constitute a violation of Title XVIII of the U.S. Code, criminal provisions of the U.S. Code. Therefore I decided to seek the advice of outside counsel

I might add here, I don't view my role as a member of the Federal Labor Relations Authority as one to police the decisions of the other members regarding such contact, if it is ex parte or not. Each of us is an independent member of an independent agency.

At the same time, I was very concerned about the advice I was getting from counsel about the nature of my responsibilities to make known what had been reported to me about a possible violation of Title XIX of the U.S. Code.

As an independent adjudicatory agency, improper conduct which amounted to obstruction of our processes or undue interferences with our processes could, I was advised, constitute violation of the Federal Criminal Code. And I had an obligation, I finally concluded, to make this information known, but I asked my counsel to try to find a way to make it known to the proper authorities who could then determine what, if any, course of action should be taken.

I didn't feel it was incumbent upon me to launch an investigation or to take any other action other than to report it to the proper authorities.

As to the Court's concern about ex parte contacts and other approaches, the ALJ concluded that the possible ex parte contacts and approaches described at the hearing did not have any effect on the final decision of the Members of the FLRA in the PATCO case.

The Court of Appeals agreed and affirmed the decision of the Federal Labor Relations Authority revoking the exclusive recognition status of PATCO and its status as a qualified labor union under the provisions of Title VII of the Civil Service Reform Act. In so concluding the Court said:

There is no reason to vacate the FLRA decision or to remand the case to the FLRA for any further proceedings. We have

- 3 -

not found any ex parte communications that irrevocably tainted the Authority's decision. Nor have the proceedings effected procedural unfairness on any of the parties.

The Supreme Court denied PATCO's petition for certiorari of this decision.

Of course, two of the contacts to which the ALJ referred included contacts with me which I believed clearly fell within one or more of the exceptions to our rule against ex parte contacts. This belief was based upon advice received from the FLRA Solicitor. Among the exceptions are communications pertaining to the status or to the settlement of a case.

Thus section 2414.6 of the FLRA's rules provides:

Ex parte communications prohibited by § 2414.2 shall not include:

.
(b) Oral or written requests for information solely with respect to the status of a proceeding.

.
(d) Oral or written communications proposing settlement or an agreement for disposition of any or all issues in the proceeding;

The Administrative Law Judge who held the hearing ordered by the Court found and I quote from his findings:

12. Member Frazier had at least three telephone conversations and one personal meeting with Mr. Blaylock during the pendency of the PATCO case. (Tr. 262)

13. During an August 17, 1981, telephone conversation initiated by Mr. Blaylock, Mr. Blaylock asked Member Frazier if they could meet so that he could brief Member Frazier on his efforts to settle the PATCO case. Mr. Blaylock and Member Frazier agreed to meet later that afternoon. (Tr. 262-263)

14. At the meeting, Mr. Blaylock asked about the status of the PATCO case and Member Frazier told him that the FLRA had just gotten the case from the Judge on the preceding Friday (August 14). (Tr. 263)

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15. Mr. Blaylock told Member Frazier that the President of the AFL-CIO had asked him to serve as an intermediary mediator to try to get the parties together to settle the case. (Tr. 263, 603)

16. Mr. Blaylock told Member Frazier that in his efforts to seek a settlement of the FAA/PATCO matter it was his intention to meet with Mr. Poli of PATCO, Secretary Lewis and other officials of DOT and FAA, the General Counsel of the FLRA, and possibly Mr. Donald Devine, the Director of the Office of Personnel Management. (Tr. 263, 603)

17. Mr. Blaylock asked Member Frazier what he thought of what Mr. Blaylock had outlined. (Tr. 264)

18. Member Frazier told Mr. Blaylock that it was the policy of the Federal Labor Relations Authority to encourage informal settlements among the parties of unfair labor practice cases, but that meant settlement by all the parties. Member Frazier also said that the settlement would have to be submitted to the Members of the Federal Labor Relations Authority for approval. Member Frazier advised he would do his best to promote the policy to encourage settlements of unfair labor practices so long as the settlement was consistent with the purposes and policies of the Statute. (Tr. 264, 603)

19. Member Frazier reported the contents of his conversation with Mr. Blaylock to Mr. Freehling, the Solicitor of the FLRA. (Tr. 265; see Tr. 673)

20. Mr. Freehling and Member Frazier agreed that the conversation involved an inquiry concerning settlement of the case and, therefore, it was permitted under the Authority's rules. (Tr. 265, PATCO Exh. 2, 5 C.F.R. § 2414.6(b), (d))

21. On two or three other occasions, Mr. Blaylock telephoned Member Frazier to give him a status report on Mr. Blaylock's efforts to settle the PATCO matter. (Tr. 265-66, 603-04)

22. In each of those conversations, Mr. Blaylock told Member Frazier whom he had spoken with or whom he was attempting to speak with. Mr. Blaylock also asked in each of the conversations the status of the case, and whether the Authority was about to issue its decision at any time in the near future. (Tr. 266, 604)

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23. Member Frazier responded to Mr. Blaylock's inquiries about the time the decision might issue by telling him that the matter was under active consideration and that the Members were working hard to reach a decision. (Tr. 266)

24. The only topics Mr. Blaylock raised with Member Frazier were requests concerning the status of the case and reports to Member Frazier concerning the nature of Mr. Blaylock's negotiations as an intermediary in an attempt to find a settlement in the case. (Tr. 417)

25. Member Frazier did not believe that Mr. Blaylock was trying to influence his decision in the PATCO case. (Tr. 267)

26. Mr. Blaylock's conversations with Member Frazier had no effect on Member Frazier's decision in the PATCO case.

According to the findings of the Administrative Law Judge:

2. On August 13, 1981, at 9:15 a.m., Secretary Lewis telephoned Member Frazier. (Tr. 258, see PATCO Exh. 3, entry for August 13, 1981)

3. Secretary Lewis stated to Member Frazier that he was not calling about the substance of the PATCO case (Tr. 258)

4. Secretary Lewis said he wanted the position of the Department of Transportation and the Federal Aviation Administration on the rumors concerning possible settlement efforts of the PATCO strike in the press or the media made clear. (Tr. 258-59) Secretary Lewis wanted Member Frazier to understand that there was no meaningful settlement effort taking place, as far as he was concerned, to settle the strike. (Id.) Secretary Lewis said that the reports one might hear on television or on the radio or read in the newspapers to the contrary, as far as he was concerned, were not true. (Id.)

5. Member Frazier was aware of those reports. (Tr. 331)

6. Secretary Lewis also stated that the Department of Transportation would appreciate expeditious processing of the case in accordance with the rules of the FLRA when the Administrative Law Judge had issued his Recommended Decision and Order. (Tr. 259)

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7. Member Frazier replied, "I understand your position perfectly, Mr. Secretary," because his response was intended to be short. He did not wish to discuss the PATCO case or its merits with Secretary Lewis. (Tr. 259, 413-14)

8. Member Frazier did not understand Secretary Lewis' call to ask that the case be handled faster than the rules permit. (Tr. 600)

Thus, I considered this contact like those involving Mr. Blaylock, to be related to settlement efforts and hence covered by the exceptions to the prohibited ex parte communications. The ALJ found that, like the Blaylock contacts, this call had no effect on my ultimate decision on the merits of the PATCO case.

SENATOR GORE REQUESTED ADDITIONAL INFORMATION AS TO WHETHER THE
FLRA HAS REVERSED ITS POSITION ON MID-TERM BARGAINING
OBLIGATIONS:

The FLRA has not reversed its position on mid-term bargaining obligations.

A number of years ago the FLRA held that if management seeks to alter an established condition of employment, management is first obligated to give the union reasonable notification of the proposed change and, when requested by the union, bargain over the substance of the change itself to the extent that it is negotiable and over the procedures and appropriate arrangements relating to the change (9 FLRA 229 and 5 FLRA 9). The FLRA has also held that during the term of an agreement management's exercise of its reserved management rights under section 7106(a) of the Statute remain subject to the management's obligation to bargain over procedures and over appropriate arrangements for adversely affected employees under section 7106(b)(2) and (3) (8 FLRA 517). Finally, the FLRA has found that the bargaining obligation would extend to any mid-contract proposals made by the union consistent with any reopener provisions the parties may include in their agreement (7 FLRA 610 and 7 FLRA 590).

However, the FLRA has also held that there is no obligation under the Statute to bargain over proposals initiated by a union during the term of an agreement where none of these described circumstances exist (17 FLRA No. 103). In reaching this decision the FLRA relied on statutory language which reflected Congress' intent that the duty of agencies and unions to bargain collectively should be construed with the public interest and governmental effectiveness and efficiency in mind, and that as a primary benefit the Statute's provisions would enhance stability in labor-management relations in the work place.

The FLRA also relied upon the legislative history of the Statute. The FLRA observed that the Senate Committee on Governmental Affairs explicitly discussed the matter of when the duty to bargain arose.

The Senate Committee stated:

The parties have a mutual duty to bargain not only with respect to changes in established personnel policies proposed by management, but also concerning negotiable proposals initiated by either the agency or the exclusive representative in the context of negotiations leading to a basic collective bargaining agreement. [S. Rep. No. 95-969, at 104, legis. hist. at 764]

Thus, this Committee referred to negotiations leading up to a basic collective bargaining agreement, and negotiations associated with management's proposal to change conditions of employment in a manner not precluded by the parties' agreement. However, the Committee specifically failed to include in its description of the duty to bargain any reference to mid-contract changes proposed by a union. The FLRA concluded that such an explicit expression of Congressional intent certainly provides a reasonable basis for inferring that under the Statute the duty to bargain was not intended to compel an agency to bargain with regard to union-initiated mid-contract proposals, absent a management initiated change in working conditions or a reopener clause in the contract.

The FLRA believed that its determination concerning the agency's mid-contract bargaining obligations is also consistent with Congress' purpose to create stability in the work place and achieve greater governmental effectiveness and efficiency. This was considered consistent with Congress' direction in section 7101(b) that "[t]he provisions of [the Statute] should be interpreted in a manner consistent with the requirement of an effective and efficient government." Both the Supreme Court and the Courts of Appeals have recognized the importance of this provision of the Statute. The FLRA pointed out that its determination promotes an increase in the comprehensiveness of basic agreements and a decrease in fragmented, protracted bargaining on an issue-by-issue basis. As the FLRA stated, a contrary result would diminish the parties' ability to rely upon their basic agreements as a stable foundation for their day-to-day relations. Parties would be discouraged from striving in their basic contract negotiations to foresee potential labor-management relations issues, and to resolve those issues in as comprehensive a manner as practicable. Instead, unlimited union-initiated mid-contract negotiations would encourage fragmentation of the collective bargaining process. Such a holding would de-emphasize bargaining for a contract in favor of more continuous bargaining on an issue-by-issue basis. As a consequence, the parties' day-to-day relations would be less certain, the prospect for protracted conflict would be enhanced, and the drain on the parties' resources would increase.

Union criticism of this decision is to some extent based upon a misunderstanding of the decision. The FLRA's decision does not "swallow" the Statute's duty to bargain or "freeze" unions' ability to initiate bargaining as some have contended. To the contrary, the FLRA recognized the continuing dynamic nature of the collective bargaining relationship when it noted that the duty to bargain applied not only when an agency sought to alter an established condition of employment but also where an

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agency's exercise of its rights under section 7106(a) gives rise to a union right to bargain concerning procedures or appropriate arrangements pursuant to section 7106(b)(2) and (3), and where the parties have negotiated a reopener provision in their basic contract. Therefore, the contention that full-fledged collective bargaining will be precluded as to all agreements except for the parties' initial agreement is unfounded.

The FLRA's holding that the Statute does not require agencies to negotiate over union-initiated mid-contract proposals is a reasonable response to these differences between the public and private sectors. The decision was intended to enhance the stability of relationships between Government agency employers and unions representing Government employees by providing an incentive for the parties to negotiate comprehensive collective bargaining agreements, while allowing parties to reopen those agreements on whatever terms and at whatever times the parties agree are best suited to their particular circumstances. At the same time, the decision would help to conserve the parties' resources and eliminate opportunities for conflict by limiting the statutory requirement to engage in mid-contract negotiations.

This matter is now on appeal before both the D.C. Circuit and the Ninth Circuit and it will be up to the Courts to make the final judgment. In their briefs to the Court of Appeals both NTEU and AFGE argue that management has an obligation to bargain over union proposals submitted during the term of an existing collective bargaining agreement even though management has not initiated any changes in conditions of employment. In support both unions cite the FLRA's decision in a Library of Congress case (9 FLRA 427). In that case, the FLRA rejected the agency's contentions that it was not obliged to bargain over the union's proposals because it had not proposed any changes in conditions of employment, finding that such changes had in fact been proposed. The FLRA then added, "[i]n any event, such an assertion is clearly inconsistent with the definition and purpose of 'collective bargaining' under the Statute."

In the brief which the FLRA's Solicitor has filed with the Court of Appeals, the FLRA pointed out that the unions read the FLRA's decision in the Library of Congress case incorrectly. As the FLRA subsequently has reaffirmed, the language cited by the unions indicated that where an agency has proposed changes to established conditions of employment, its bargaining obligation with respect to those changes cannot be confined strictly to the specific matters as to which a change is proposed, but rather extends to union proposals concerning

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other matters related to the same area within which the agency proposed a change. E.g., Internal Revenue Service, 10 F.L.R.A. 182, 184 (1982). Further, the FLRA previously had explicitly rejected the unions' characterization of the Library of Congress cases in a decision issued on November 30, 1984 (Environmental Protection Agency, 16 F.L.R.A. 602 n. 2 (1984)).

In summary, management had initiated changes in conditions of employment in the Library of Congress case. The language which the unions cite in the FLRA decision in that case was intended to answer the Library's contention that it had, in effect, an obligation to negotiate only over matters directly specifically and strictly related to the change itself. The FLRA answer was that union proposals in such circumstances could not be so confined and limited but could extend to other matters related to the same general area within which the agency proposed a change.

INFORMATION CONCERNING THE "EXCESSIVE INTERFERENCE" STANDARD
REQUESTED BY SENATOR GORE:

Senator Gore requested additional information concerning the FLRA's action in adopting the "excessive interference" standard for determining the duty to bargain over "appropriate arrangements." Specifically he requested information concerning the relationship between the D.C. Circuit's decision in AFGE Local 2782 (702 F.2d 1183) and the Eleventh Circuit's decision in Robins Air Force Base (727 F.2d 1502) and an explanation as to why the FLRA did not adopt the "excessive interference" test fashioned by the D.C. Circuit sooner.

The issue of which standard was to be applied in section 7106(b)(3) cases, with options, was presented by the staff to the Members at a case agenda in late July 1984--about a month before I became Acting Chairman. The issue was not resolved during the period of turnover among Members in 1984. (Chairman Mahone left at the end of August and Member Haughton at the end of December.) The delay in issuing this decision was quite clearly the result of the turnover in membership of the FLRA, the inevitable drop in productivity in the first weeks or months of a new Member's term and the need at the FLRA, as with any collegial body, for Members to reach agreement before a decision can issue.

In January 1985 a memorandum entitled "The standard for determining the duty to bargain over 'appropriate arrangements' under section 7106(b)(3)" was prepared by the Solicitor of the agency and submitted to the Members as a part of the Source Book prepared by the Solicitor's office immediately after Member McGinnis took office. (Copy attached.) In that memorandum the decision of the two Circuits is summarized and it is noted that "the 11th Circuit decision is in apparent conflict with the D.C. Circuit's decision in AFGE Local 2782."

In a case briefing in June of 1985 Member McGinnis and I reached some degree of agreement and asked the staff to draft a proposed decision adopting the "excessive interference" test provided it was done in a case that would likely become a vehicle to resolve the seeming conflict between the D.C. and Eleventh Circuits. The staff prepared a draft decision adopting the "excessive interference" test which was forwarded to the Members on October 7, 1985, which I approved on October 29, 1985. However, Member McGinnis did not approve the draft decision but instead sent the staff a memorandum which requested that the staff prepare an alternate draft which would utilize the "direct interference" test and would find that the union proposal was not an appropriate arrangement. (Copy attached.) The issue therefore remained deadlocked until Chairman Calhoun came aboard and we joined to approve the issuance of a decision which adopted the excessive interference test.

Attachments

MEMORANDUM

JAN 14 1985

TO: MEMBERS OF THE AUTHORITY

FROM: Ruth E. Peters
SolicitorSUBJECT: The standard for determining the duty to bargain over
"appropriate arrangements" under section 7106(b)(3)

This memorandum sets forth the background on the issue of the standard to be applied in determining the duty to bargain over a proposal that a union contends is a negotiable "appropriate arrangement" under section 7106(b)(3) of the Statute.

A. The statutory duty to bargain

Under the Statute, the duty to bargain extends to conditions of employment --that is, personnel policies, practices and matters affecting working conditions of unit employees. 5 U.S.C. § 7103(a)(14). However, the duty to bargain does not extend to matters proposed for bargaining which are, inter alia, inconsistent with federal law or government-wide rules or regulations. 5 U.S.C. § 7117. Section 7106(a) of the Statute sets forth certain management rights concerning which agencies may not bargain. Section 7106(b)(1) sets forth certain matters--for example, the "technology, methods, and means of performing work"--over which an agency may bargain if it elects to do so. Section 7106(b)(2) provides that nothing in section 7106 shall preclude bargaining over "procedures which management officials of the agency will observe in exercising any authority under this section" (emphasis added). Further, section 7106(b)(3) provides that nothing in section 7106 shall preclude bargaining over "appropriate arrangements for employees adversely affected by the exercise of any authority under this section by such management officials" (emphasis added).

B. The D.C. Circuit's decision in AFGE Local 2782

Before the D.C. Circuit issued its decision in American Federation of Government Employees, AFL-CIO, Local 2782 v. FLRA, 702 F.2d 1183 (D.C. Cir. 1983) (Attachment 1), the Authority employed the "direct interference" test to determine whether a bargaining proposal described by a union as a "procedure" under section 7106(b)(2) was negotiable, or whether a union proposal proffered as an "appropriate arrangement" under section 7106(b)(3) was negotiable. That is, a proposal proffered either as a "procedure" or as an "appropriate arrangement," but which the Authority determined would "directly interfere" with the exercise of management's substantive rights, was accordingly determined to be nonnegotiable. The Authority applied the "direct interference" test

in O-NG-352,^{1/} the Authority case underlying the D.C. Circuit's decision in AFGE Local 2782 v. FLRA. In that case, the union alleged that the following proposal regarding the selection of repromotion eligible employees was an "appropriate arrangement" under section 7106(b)(3):

Section 5. Notwithstanding any other provision of this article, a repromotion eligible (i.e., an employee demoted through no fault of his or her own) will be selected for the first available vacancy for which he or she fully meets the qualification standards and which the agency determines to fill.

The Authority held the union's proposal nonnegotiable since the proposal, by mandating selection of a particular employee, would directly interfere with the exercise of management's rights under section 7106(a)(2)(C) to select among candidates from any appropriate source in filling a vacancy.

On review of the Authority's decision in O-NG-352, the D.C. Circuit rejected the Authority's application of the direct interference test to appropriate arrangements questions. The court (Scalia, J.) noted that the D.C. Circuit had approved the direct interference test in Department of Defense v. FLRA, 659 F.2d 1140 (D.C. Cir. 1981), cert. denied, 455 U.S. 945 (1982), but that the Authority determinations under review in that case involved issues regarding what constitutes negotiable "procedures" under section 7106(b)(2). 702 F.2d at 1186. The direct interference test or a variant of it is often used to distinguish "procedure" from "substance," the court said, and thus the test as applied to section 7106(b)(2) did not deprive the Statute of all its meaning. Ibid. However, the direct interference test as applied to appropriate arrangements issues would deprive section 7106(b)(3) of its meaning, the court indicated, since under those circumstances section 7106(b)(3) would appear to be entirely duplicative of section 7106(b)(2). Ibid.

The court held, therefore, that "the Authority cannot find a union proposal regarding adversely affected employees to be nonnegotiable simply because the proposal envisions some constraints" upon management rights. 702 F.2d at 1188. The court also stated that "the broad limiting word 'appropriate' allows the Authority to effect 'needful limitations' (702 F.2d at 1187), and that "[u]ndoubtedly, some arrangements may be inappropriate because they impinge upon management prerogatives to an excessive degree." 702 F.2d at 1188 (emphasis in original). The court thus remanded the case to the Authority to determine whether the union proposal was an appropriate arrangement. Ibid.

^{1/} American Federation of Government Employees, AFI-CIO, Local 2782 and Department of Commerce, Bureau of Census, Washington, D.C., 7 F.L.R.A. 91.

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On remand, the Authority applied the D.C. Circuit's "excessive interference" test as required by the court's order and determined in a decision issued on May 11, 1984, that the proposal did not interfere with the exercise of management rights to an excessive degree (Attachment 2). However, the Authority held that the proposal was nevertheless nonnegotiable because it was inconsistent with government-wide regulations regarding management's right to select from a group of best qualified candidates or from any other appropriate source.^{2/}

C. Subsequent D.C. Circuit decisions

The D.C. Circuit has applied its decision in AFGE Local 2782 v. FLRA, to two other cases. In Association of Civilian Technicians, Montana Air Chapter v. FLRA, No. 83-1489 (D.C. Cir. Aug. 1, 1983) (Attachment 3) the court summarily reversed the Authority's determinations on two proposals regarding RIF'd employees in Authority Case No. O-NG-387, issued as 11 FLRA No. 88. The Authority had determined that the two proposals, alleged by the union to be "appropriate arrangements" under section 7106(b)(3) directly interfered with the exercise of management rights.^{3/}

In Local 32, AFGE, AFL-CIO v. FLRA, 728 F.2d 1526 (D.C. Cir. 1984) (Attachment 4), the court, in an opinion written by Judge Fairchild of the Seventh Circuit, noted that one proposal regarding repromotion eligible employees in that case was "nearly identical" to the proposal in AFGE Local 2782 v. FLRA. The court found a remand to be unnecessary in Local 32, since the proposal in that case would permit management to pass over the repromotion eligible if management has "persuasive reasons" for doing so. 728 F.2d at 1530. That proviso, the court stated, would make it difficult to claim that the proposal "would infringe upon management prerogatives to an excessive degree." Ibid. (footnote omitted.) Accordingly, the court reversed the Authority's decision as it pertained to that proposal, and remanded it to the Authority for entry of a bargaining order.^{4/}

^{2/} The union requested, and the Authority granted, reconsideration in O-NG-352 on the issue of whether the union proposal is inconsistent with a government-wide rule or regulation; a draft decision on this issue is currently before the Members.

^{3/} The negotiability staff has informed us that a draft decision on those two proposals, finding them to be inconsistent with the National Guard Technicians Act, is being forwarded to the Members.

^{4/} The Authority issued its order on remand on July 10, 1984 (Attachment 5).

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D. The Eleventh Circuit's decision
in Robins Air Force Base

A recent Eleventh Circuit decision (United States Air Force, Headquarters, Warner Robins Air Force Logistics Command, Robins Air Force Base, Georgia v. FLRA, 727 F.2d 1502 (11th Cir. 1984) (Attachment 6)), also involved the "appropriate arrangements" issue. In the Authority decision (8 F.L.R.A. 667) under review in that case, the Authority found the following proposal negotiable:

Employee Utilization

Section E. It is recognized that part-time employees are essential in carrying out the mission of the Employer; however, full-time employees will be utilized to the fullest extent possible. Part-time employees will be utilized only when it is not practical nor prudent to use full-time employees.

On review, the Eleventh Circuit refused to enforce the Authority's decision. The court found that "[g]iven the clear language of [section 7106 of] the Statute and the clear effect of the proposal . . . the only logical conclusion in this case is that the proposal is not bargainable" (footnote omitted). 727 F.2d at 1505-1506. In particular, the court noted that "[t]o the extent that the FLRA concluded that the proposal is an 'appropriate arrangement,' we hold that no reasonable basis supports that decision. Subsection [7106](a) clearly states that the agency retains the authority to determine the 'personnel by which agency operations shall be conducted' and to hire and fire employees. If this proposal is negotiable as an appropriate arrangement, we cannot envision what would remain for the agency to determine under subsection (a)" [footnote omitted]. 727 F.2d at 1504-1505.

In a memorandum (Attachment 7) recommending against seeking rehearing of the Eleventh Circuit case, the Solicitor's Office noted the 11th Circuit decision is in apparent conflict with the D.C. Circuit's decision in AFGE Local 2782. The Eleventh Circuit approved the Authority's use of a "direct interference" standard, but disagreed with the Authority's application of the standard to the proposal in that case. Thus, although the Eleventh Circuit cited AFGE Local 2782 approvingly, it appeared to apply a test that was rejected by the D.C. Circuit as "contrary to law." The Solicitor's Office recommended in view of the confusion likely to result from this apparent disagreement between the two courts, that the Authority clearly explicate its view, in a suitable negotiability proceeding, as to what standard the Authority will apply in resolving "appropriate arrangements" issues.

The issue of the standard to be applied in section 7106(b)(3) cases was presented for discussion at an Authority agenda on Case No. O-NG-364 on July 25 and 26, 1984). In an agenda briefing memo (Attachment 8) to the Members, the negotiability staff articulated

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the three apparent options available to the Authority: (1) the "excessive interference" approach of the D.C. Circuit in AFGE Local 2782; (2) the "direct interference" test as applied by the Authority in its decisional precedent; (3) the "direct interference" test as applied by the Eleventh Circuit in Robins Air Force Base. The negotiability staff has identified (see Attachment 9) 14 cases, including O-NG-364, that are currently at step 14 in the casehandling process.

Attachments



UNITED STATES OF AMERICA
FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C. 20424

OFFICE OF THE MEMBER

MEMORANDUM

October 23, 1985

TO: Stuart Horn
Assistant Chief Counsel (Negotiability)

FROM: William J. McGinnis, J. *William J. McGinnis*
Member

SUBJ: Negotiability Case
Case No. 0-NG-968

PARTIES NATIONAL ASSOCIATION OF GOVERNMENT EMPLOYEES, LOCAL
R 14-87, and the KANSAS ARMY NATIONAL GUARD

Please have the negotiability staff prepare an alternative draft in the above case. The alternative draft should find proposal 2 nonnegotiable consistent with the position of the agency set forth on pages 5 and 6 of its brief. Thus the draft should find that proposal 2 interferes "directly" with the agency's right under section 7106(a)(2)(C) to select employees for vacant positions since it would require the agency to fill a position with a particular employee rather than merely require the agency to select from a group of similarly qualified and situated employees.

In addition the draft should find that proposal 2 is not an "appropriate arrangement" within the meaning of section 7106(b)(3) of the Statute. This is because the proposal provides that when a vacant position is filled from which employees have been demoted and there are two or more demoted employees who are candidates for the position, management would select the candidate who has the highest retention standing. The proposal is not an "appropriate arrangement" since it discriminates within the class of adversely affected employees and confers a benefit on one member of the class, the employee with the highest retention standing, which the employee did not possess with regard to the employee's contemporaries prior to the RIF. In addition since the affected employee did not enjoy priority consideration for promotions over other employees prior to the RIF such priority consideration cannot be conferred on the employee under the guise of an "appropriate arrangement." The draft should emphasize that the purpose of section 7106(b)(3) is to enable the parties to eliminate or reduce the adverse effect on employees of a particular management decision. Such proposals therefore are of

period of limited duration and limited in scope to the period encompassed by the change and the adverse effects experienced by employees at the time of the change. They may not be used as a device to alter employee terms and conditions of employment on a permanent or semipermanent basis. Thus, they cannot be used as a device for setting aside selections on the basis of merit or otherwise be used to alter the basic competitive relationships employees share with one another under the merit system.

QUESTION 1 BY SENATOR GLENN:

The FLRA is by Statute mandated to provide leadership in establishing policies and guidance relating to matters under the Statute and is responsible for prescribing the rights and obligations of the employees of the Federal Government and to establish procedures designed to meet the special requirements and needs of the government.

Mr. Frazier, you have been involved with the FLRA since its inception in 1978. I think you will agree with me that there have been a number of problems at the Authority and many still exist. There definitely seems to be a perception that a lack of leadership exists. A survey sent to 655 members of the SFLRP indicates that 60% of those who responded believe that FLRA's performance in providing leadership and directions for the Federal Senate Labor Relations is ineffective. Do you feel, as I do, that this is a major problem and how do you plan to remedy it?

ANSWER:

I plan to work closely with my fellow Members to provide effective leadership through the establishment of policies and guidance. This is a mandate of the Statute and is something the FLRA must do. The results of the SFLRP Survey showed that the 73 members of that 655 member organization who responded rated the FLRA as ineffective in providing such leadership. The FLRA clearly should do whatever it is capable of doing to change the perception of those who believe that the agency does not provide sufficient leadership.

There are several ways in which such leadership through the formal establishment of policies and guidance has and will continue to be provided:

- (1) through the adjudication of cases and especially through the issuance of more "lead" decisions on significant issues;
- (2) through the issuance of general statements of policy or guidance as provided for in the FLRA's rules;
- (3) through substantive rulemaking for which we have recently encouraged unions and agencies to identify issues susceptible to such treatment; and
- (4) through oral argument and other open meetings of the Authority.

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The Members also provide leadership through less formal means such as joint sponsorship of conferences by the FLRA; appearances at conferences, meetings and seminars held by agencies, unions and other organizations; and the publication of articles on Federal labor-management relations.

I personally believe that the perception that the FLRA has been ineffective in providing leadership through the establishment of policies and guidance has, in large part in recent years, resulted from the absence of a full complement of confirmed Members at the FLRA. Since September 1, 1984, the agency has had only two Members and never has more than one been serving a confirmed term. The other Member has been variously a holdover Member, a recess appointee or an Acting Chairman. In fact from July 1, 1985 to December 15, 1985, no Member of the agency held a confirmed term. Moreover, in the seven and one-half years of its existence, the FLRA has had five different combinations of people serving as Members. Such instability and lack of some degree of permanency among the Members is bound to create a perception that the FLRA is not in a position to provide any real program leadership. With a full complement of confirmed Members on board, I am sure that perception would begin to change--especially after the Members begin to take concerted and collective action to provide such leadership.

The FLRA is an independent collegial body of three Members who are charged with the responsibility of adjudicating a variety of cases involving labor-management disputes and of issuing formal rules and regulations in addition to its responsibility to provide leadership through policies and guidance. Since its inception, the FLRA has attempted to provide such policy leadership and guidance primarily through its case decisions just as the National Labor Relations Board and the Federal Courts have established the meaning of the National Labor Relations Act since its passage over 50 years ago.

Thus, for example, in recent months after Chairman Jerry Calhoun joined the FLRA, he and I discovered that we were in close agreement on many of the cases which had been in abeyance and we joined to issue decisions in many of these cases. Included were "lead" decisions which were intended to provide policies and guidance on such issues as: (1) the negotiability of travel and per diem for union negotiators (which we found negotiable, relying upon language in a Supreme Court decision); (2) the test to be applied when determining whether a bargaining proposal is negotiable as an appropriate arrangement for employees adversely affected by the exercise of management rights (here we adopted and explicated the meaning of the excessive interference test developed by the D.C. Circuit); and (3) under what circumstances an arbitrator may grant attorney's

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fees under the Back Pay Act. Each of these "lead" decisions contained a great deal of policy guidance designed to assist labor and management, the Federal labor bar, arbitrators, ALJ's and other neutrals. Further, such "lead" decisions enable the Authority to expeditiously issue decisions in other cases presenting the same issue.

In a July 2 letter which the Members sent to each party who submitted suggestions in connection with the FLRA's review of case processing procedures, the FLRA announced that it will continue to issue "lead" decisions on issues common to many cases allowing subsequent decisions based on the "lead" case to be issued as quickly as possible. Further, the FLRA also announced that it had instituted an "issue management" program enabling it to identify and group cases containing like issues to permit one-time, collective consideration of such cases by the staff and the Members.

The FLRA's rules have, since the inception of the agency, contained a part (Part 2427) which sets forth procedures under which requests may be submitted to the FLRA seeking the issuance of general statements of policy or guidance. In the July 2 letter the FLRA announced that it "will use rulemaking on appropriate issues. Parties are encouraged to identify issues on which they believe rulemaking is more appropriate than case adjudication."

In connection with the FLRA's review of case processing procedures, the Members held an open meeting and invited representatives of agencies and unions to appear and state their views on certain key issues. Some form of oral presentation or oral argument should be utilized wherever an exchange between the Members and representatives of our public would be useful in the resolution of key issues before the FLRA.

Less formal methods of providing leadership include holding conferences where Members and staff of the FLRA can address audiences of labor, management and neutrals. Thus, in recent months the FLRA as an agency has participated as a joint sponsor of two such conferences. First, a conference jointly sponsored with the Public Administration Forum entitled "Directions 1986: Shaping the Future of Federal Labor Relations" and subtitled "Successes and Failures in Federal Labor Relations: Where Do We Go From Here?--An Exchange of Views Among Unions, Management and the FLRA." Second, a conference in which the FLRA joined with EEOC, MSPB, the Special Counsel, the NLRB and OPM to present a program on "Rights and Responsibilities in Resolving Disputes in the Federal Government." As a Member of the FLRA, I personally participated in and spoke at both conferences just as did Chairman Calhoun.

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The Members and the staff have always accepted as many invitations to speak at conferences sponsored by other organizations, unions and agencies as time and resources permit. (Thus, for example, please see the item entitled "Speeches Delivered in Recent Years" on my attached resume which demonstrates my active participation in such conferences.) I would most certainly propose to continue this activity.

In addition, as a Member I have always accepted any opportunity to prepare articles for publication on the Federal labor-management relations program and I would continue to do so. Thus, I would refer the Committee to the 17 published articles which I submitted to it and which include articles in such periodicals as The George Washington University Law Review, The Labor Law Journal and The Arbitration Journal (the official publication of the American Arbitration Association) as well as chapters in several published texts on labor-management relations. (Please see the item "Published Articles" in my attached resume.)

I should note that, in providing informal leadership, whether it be through speeches, published articles or even informal meetings with participants in the program, there are clearly limits to what I, as an individual Member, may do. There are the legal restrictions established by law and reflected in our regulations. I may not engage in prohibited ex parte communications concerning the substance of matters pending before the Authority for decision under our adjudicatory procedures. I may not provide advisory opinions or prejudge a matter which may subsequently come before the Authority for decision.

Of course, to the extent that I as an individual Member provide informal leadership through writings and addresses, that role is to some extent circumscribed by the very nature of the body of which I am a Member. As a Member of a collegial body heading an independent adjudicatory agency, I cannot commit the agency to any particular course of action because the Members must collectively decide what course the agency will follow.

However, within these limitations and consistent with policies and precedent which have been previously set by the FLRA Members collectively, an individual Member can and must provide informal guidance and leadership to the parties in our program. I have always striven to do just that and would continue to do so if confirmed as a Member.

Attachment

RESUME OF HENRY B. FRAZIER III
1605 STONEBRIDGE ROAD
ALEXANDRIA, VIRGINIA 22304

SUMMARY OF PROFESSIONAL EXPERIENCE

As Acting Chairman and as a Member of the U. S. Federal Labor Relations Authority and in my several previous positions, I have performed a combination of duties as an attorney, government executive, administrator, manager, adjudicator, speaker and writer.

DEGREES

B.A. with Honors (Political Science), University of Virginia
J.D. with Honors, George Washington University Law School
LL.M. (Labor Law), Georgetown University Graduate Law Center
M.L.T., Georgetown University Graduate Law Center

RECOGNITION AND HONORS

Official Recognition:

Designated Acting Chairman of the Federal Labor Relations Authority by the President effective September 1, 1984 to December 15, 1985.

Appointed (and reappointed) by the President and confirmed (and reconfirmed) by the U. S. Senate to a seat on the Federal Labor Relations Authority (1979 and 1980).

Special Citation for Exceptional Performance from the Director of Office of Management and Budget, The Chairman of Civil Service Commission and Secretary of Labor (1975).

Secretary of the Army Award for Exceptional Civilian Service (highest Army award for civilian personnel) (1970).

First Annual Kushnick Award for Outstanding Achievement in Civilian Personnel Administration presented by Secretary of Army (1968).

Outstanding Performance Award (1968).

Sustained Superior Performance Award (1961).

Unofficial Recognition:

Listed in: Marquis' Who's Who in the World (6th and 7th eds.) 1982-1985
Marquis' Who's Who in America (42nd and 43rd eds.) 1982-1985
Marquis' Who's Who in the East (18th, 19th and 20th eds.) 1981-1985
Marquis' Who's Who in Law (3rd ed.) 1983
Marquis' Who's Who in Government (1st, 2nd & 3rd eds.) 1972-present

Academic Honors:

Omicron Delta Kappa (Leadership Honor Society)
Order of Coif (Legal Scholastic Honor Society)
Phi Beta Kappa
The Raven Society (Leadership Honor Society)
Intermediate Honors Society (Scholastic Honorary)
Phi Eta Sigma (Scholastic Honorary)
Du Pont Regional Scholarship - University of Virginia

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EXPERIENCE

December 1985-Present: Member, U. S. Federal Labor Relations Authority (Adjudication of labor cases and resolution of labor disputes; establishment of Government-wide labor-management relations policies.)

September 1984-December 1985: Acting Chairman, U.S. Federal Labor Relations Authority (Serve as Chief Executive Officer and Chairman of three-Member Federal agency.)

January 1979-September 1984: Member, U.S. Federal Labor Relations Authority

January 1973-January 1979: Executive Director, U. S. Federal Labor Relations Council (Management of staff of attorneys and labor specialists supporting Presidential appointees who adjudicated labor cases and resolved labor disputes.)

June 1970-January 1973: Deputy Executive Director and Chief Program Division, U. S. Federal Labor Relations Council (Manager and supervisor of professional staff of attorneys and labor specialists developing proposed decisions and policies for consideration and adoption by members.)

October 1968-June 1970: Deputy for Civilian Personnel Policy and Civil Rights, Office of Assistant Secretary of Army for Manpower (Policy adviser to Assistant Secretary on all personnel matters pertaining to 400,000+ civilian work force and on civil rights and EEO issues pertaining to all military (active and reserve) and civilian personnel.)

April 1963-October 1968: Special Projects Officer, Office of the Deputy Chief of Staff of the Army, Civilian Personnel Division (Performed a variety of special projects, primarily in the position and pay management fields.)

MEMBERSHIPS & CIVIC ACTIVITIES

Virginia Bar
Bar of the District of Columbia
Bar of the Supreme Court of the United States
National President (1985-86); National Vice-President (1984-85);
and Member, Board of Managers (1980-Present), University of
Virginia Alumni Association, Charlottesville, Virginia
Board of Directors, University of Virginia Club of Washington
Board of Directors, Virginia Student Aid Foundation, Region XVI
Board of Directors & Treasurer, Dept. of Army Civilian Personnel
Alumni Association
Society of Federal Labor Relations Professionals
Sons of the American Revolution
Phi Kappa Psi

PERSONAL

DOB: August 9, 1934
Married to: Joan McIntosh Frazier
High School: Suffolk High School, Suffolk, Virginia (1952)
Hobbies: Golf, cycling, swimming, fishing, antiques, collectibles,
genealogy and an avid University of Virginia and Washington Redskins fan

REFERENCES UPON REQUEST.

PUBLISHED ARTICLES

"The Federal Labor Relations Council," in Power, Sackman, Banier, Goodman & Ham (eds.), Negotiation/Arbitration '72. New York: Niagara University Press (1972).

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"Federal Employment," in Muriel K. Gibbons, et al. (eds.), Portrait of a Process--Collective Negotiations in Public Employment. Fort Washington, Pennsylvania: Labor Relations Press (1985).

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"Remarks on Federal Sector Labor-Management Relations," Federal Labor Relations Reporter (April 1985), Labor Relations Press, 85 FLRR No. 6.

"Arbitration in the Federal Sector," The Arbitration Journal, Vol. 41, No. 1 (March 1986), pp. 70-76.

SPEECHES DELIVERED IN RECENT YEARS

- Los Angeles Federal Executive Board, Los Angeles, California, February 1978.
- Society of Federal Labor Relations Professionals Regional Conference, Washington Plaza Hotel, Seattle, Washington, February 1978.
- Conference on Public Sector Labor Relations at Urban Life Center, Georgia State University, Atlanta, Georgia, May 1978.
- Cornell University Conference on Dispute Resolution in the Federal Sector, Biltmore Hotel, New York City, June 1978.
- Annual Convention of the Association of Labor Relations Agencies, Copley Plaza Hotel, Boston, Massachusetts, July 1978.
- Eighth Annual Collective Bargaining Symposium for Labor Relations Executives, Federal Executive Institute, Charlottesville, Virginia, July 1978.
- National Convention of the National Federation of Federal Employees, Tucson, Arizona, September 1978.
- Society of Federal Labor Relations Professionals, Washington, D.C., September 1978.
- American Bar Association Committee on Federal Labor-Management Relations, Washington, D.C., October 1978.
- San Francisco Federal Executive Board, San Francisco, California, November 1978.
- Honolulu-Pacific Federal Executive Board, Honolulu, Hawaii, November 1978.
- Federal Management Conference on Implementation of Civil Service Reform, Chevy Chase, Maryland, January 1979.
- National Association of Government Employees Conference on Civil Service Reform, Boston, Massachusetts, January 1979.
- AFL-CIO Public Employee Department, University of Maryland, January 1979.
- Treasury Department, Bureau of Customs Conference, Tucson, Arizona, February 1979.
- American Federation of Government Employees, AFL-CIO, Conference on Civil Service Reform, St. Louis, Missouri, March 1979.
- Annual Meeting of Society of Federal Labor Relations Professionals, Washington, D.C., March 1979.
- Department of the Navy, Office of the General Counsel Conference on Arbitration in the Federal Sector, Arlington, Virginia, March 1979.

International Personnel Management Association, The Challenges of Civil Service Reform, Capital Hilton, Washington, D.C., April 1979.

Denver Federal Personnel Council, Estes Park, Colorado, May 1979.

Federal Personnel Association of New York and New Jersey, Cherry Hill, New Jersey, May 1979.

National Guard Bureau, State Adjutants General Meeting on Civil Service Reform, Dulles Marriott Hotel, Virginia, May 1979.

Federally Employed Women, Training Conference, University of Maryland, May 1979.

Rhode Island Bar, Providence, Rhode Island, June 1979.

American Arbitration Association Regional Conference, Los Angeles, California, June 1979.

Southwestern Labor Relations Council, Biltmore Hotel, Los Angeles, California, June 1979.

San Francisco Federal Personnel Council, San Francisco, California, June 1979.

Collective Bargaining Symposium for Labor Relations Executives, Williamsburg, Virginia, July 1979.

Federal Executive Board, New Orleans, Louisiana, August 1979.

International Association of Fire Fighters Regional Conference, Dayton, Ohio, September 1979.

American Arbitration Association Regional Conference, Nashville, Tennessee, October 1979.

Eastern Conference of Federal Managers' Association, Pensacola, Florida, November 1979.

1979 Convention of the International Labor Press Association, Shoreham-Americana Hotel, Washington, D.C., November 1979.

International Association of Fire Fighters Regional Conference, Reston, Virginia, November 1979.

American Arbitration Association Regional Conference, Atlanta, Georgia, November 1979.

International Personnel Management Association, George Washington University Faculty Club, Washington, D.C., February 1980.

American Arbitration Association Regional Conference, Portland, Oregon, February 1980.

American Arbitration Association Regional Conference, Clearwater Beach, Florida, February 1980.

Society of Federal Labor Relations Professionals, Eighth Annual Symposium, Washington, D.C., March 1980.

International Association of Fire Fighters, Reno, Nevada, March 1980.

Assistant Secretary of Defense Annual Conference on Civilian Personnel and Manpower, The Homestead, Hot Springs, Virginia, March 1980.

Cornell University Guest Lecturer at graduate level classes, Ithaca, New York, April 1980.

National Academy of Arbitrators, Arbitration in the Federal Sector, Los Angeles, California, June 1980.

Association of Labor Relations Agencies, Vancouver, B.C., July 1980.

Federal Executive Institute Collective Bargaining Symposium for Labor Relations Executives, Charlottesville, Virginia, July 1980.

Society of Professionals in Dispute Resolution, Capital Hilton, Washington, D.C., October 1980.

Society of Federal Labor Relations Professionals, Boston, Massachusetts, October 1980.

Southwestern Labor Relations Council Seminar, Los Angeles, California, February 1981.

Federal Managers' Association, Sheraton Hotel, Washington, D.C., February 1981.

Judge Advocate General's School, Charlottesville, Virginia, March 1981.

Federal Personnel Council of Northern California, Monterey, California, March 1981.

Arizona Labor Relations Council, Phoenix, Arizona, April 1981.

U.S. Department of Agriculture Collective Bargaining Conference, Arlington, Virginia, April 1981.

Western Region, Office of Personnel Management, Conference on the Arbitration of Labor Disputes, San Francisco, California, April 1981.

Honolulu-Pacific Federal Executive Board, Honolulu, Hawaii, May 1981.

Federal Executive Institute Annual Collective Bargaining Symposium for Labor Relations Executives, Charlottesville, Virginia, July 1981.

Maine Labor Relations Board, Collective Bargaining at the County Level, Bangor, Maine, September 1981.

Labor Policy Association, Fairmont Hotel, San Francisco, California, September 1981.

Labor Policy Association, Wintergreen, Virginia, November 1981.

Army World-Wide Personnel Officers Conference, Current Topics in Federal Labor-Management Relations, Alexandria, Virginia, December 1981.

American Bar Association Committee on Federal Labor-Management Relations Law, Annapolis, Maryland, February 1982.

Fifth Annual Department of Defense Labor Relations Conference, Arlington, Virginia, March 1982.

University of Virginia School of Law, Public Sector Collective Bargaining Seminar, Charlottesville, Virginia, April 1982.

Labor Policy Association, Wintergreen, Virginia, May 1982.

International Personnel Management Association, Washington, D.C., November 1982.

American Bar Association Committee on Federal Labor-Management Relations Law, Annapolis, Maryland, February 1983.

Chicago-Kent College of Law, Conference on Current Developments on Federal Labor Relations and Labor Law, Chicago, Illinois, May 1983.

Federal Executive Institute, Top Management Seminar, Current Issues in Personnel Management and Performance Evaluation, Charlottesville, Virginia, June 1983.

Administrative Law Institute, Conference on Federal Labor Relations and the Law, Washington, D.C., February 1984.

Defense Logistics Agency, Labor-Management Relations Seminar for Commanders, Alexandria, Virginia, March 1984.

Administrative Law Institute, Conference on Federal Labor Relations and the Law, Denver, Colorado, March 1984.

Federal Managers' Association's 46th Annual Convention, Arlington, Virginia, April 1984.

Judge Advocate General's School, 25th Federal Labor Relations Course, Charlottesville, Virginia, May 1984.

Western Executive Seminar Center, Federal Personnel Management Issues, Denver, Colorado, June 1984.

Office of Personnel Management, Labor Relations Symposium, Gettysburg, Pennsylvania, September 1984.

Department of Navy, East Coast Labor and Employee Relations Conference, Cherry Hill, New Jersey, October 1984.

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Administrative Law Institute and Labor Relations Press Program, San Francisco, California, January 1985.

Administrative Law Institute and Labor Relations Press Program, Arlington, Virginia, February 1985.

Federal Sector Labor-Management Relations Seminar, Hampton Roads Chapter of SFLRP and FMCS, Virginia Beach, February 1985.

Society of Federal Labor Relations Professionals, Washington Chapter, Washington, D.C., June 1985.

American Arbitration Association Summer Workshop, Stratton, Vermont, July 1985.

Department of the Navy East Coast Labor and Employee Relations Conference, Norfolk, Virginia, November 1985.

Federal Labor Relations Authority and Public Administration Forum Program, Arlington, Virginia, May 1986.

The Equal Employment Opportunity Commission's Office of Review and Appeals Conference, Dallas, Texas, May 1986.

QUESTION 2 BY SENATOR GLENN:

The U.S. Court of Appeals for the District of Columbia issued a decision in November 1985 regarding de facto stays of arbitration awards that were under appeal which said the FLRA had, and I quote, "emasculated its own regulations" by "fail[ing] to even mention the significance of the regulation, much less [providing] a coherent justification of the abandonment of . . . statutory interpretation embodied in that regulation. . . ." Have you implemented this decision yet? [If no] why haven't you and when do you intend to implement it? Can you give us a timetable for implementation?

ANSWER:

The Federal Labor Relations Authority has acted to implement the decision of the Court of Appeals in the Soldiers' and Airmen's Home case (No. 84-1439 (D.C. Cir.) Nov. 22 1985).

The FLRA issued a Supplemental Decision and Order in Soldiers' and Airmen's Home (21 FLRA No. 44) on April 17, 1986 wherein it announced that it accepted the Court's opinion as the law of the case. It issued a remedial order against the respondent Soldiers' and Airmen's Home directing that it cease and desist its failure to comply with arbitration awards where no request for stay has been filed and directing that it comply fully with the arbitration award therein and take other actions.

The statutory scheme for judicial review of FLRA orders is similar to the scheme for review of orders of the National Labor Relations Board. Compare 5 U.S.C. § 7123(a), (b) (FLRA); 29 U.S.C. § 160(e), (f) (NLRB). Unlike, for example, Merit Systems Protection Board orders, which are reviewable in only one court of appeals, the Federal Circuit, orders of the FLRA and NLRB are reviewable in the 11 regional courts of appeals and in the District of Columbia Circuit. Given these jurisdiction and venue provisions, various courts of appeals may consider same or similar legal issues arising out of FLRA (or NLRB) orders, and may, in such instances, reach conflicting results. Compare, e.g., EEOC v. FLRA, 774 F.2d 842 (D.C. Cir. 1984), cert. dismissed, 106 S. Ct. 1678 (1986), with Defense Language Institute v. FLRA, 767 F.2d 1398 (9th Cir. 1985) (conflicting positions on negotiability of contracting out proposals); and United States Customs Service, Region II v. FLRA, 738 F.2d 829, 831-832 (2d Cir. 1984), with Dep't of the Treasury v. FLRA, 762 F.2d 1119, 1121 n. 2 (D.C. Cir. 1985) (conflicting positions on "acting at all" standard).

In these circumstances, it seems appropriate for an agency such as the FLRA (and consonant with NLRB practice), when

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considering a matter upon reversal and remand by a court of appeals to accept the court's decision as the law of the case and to take action consistent with the court's opinion without necessarily declaring its future intentions regarding adoption of that court's view. (When an agency such as the FLRA is reversed without remand, the agency's decision to acquiesce in the court's decision in the future must, of course, await agency consideration in a future case.) The agency may decide in a future case to adopt the views of one or more courts and to abandon the agency's previous holdings or it may adhere to its prior precedent, but further articulate its rationale. Further, after full consideration by various courts of appeals, the agency's position may be reviewed, and affirmed or reversed on the merits, by the Supreme Court.

Both before and after the decision of the Court of Appeals in Soldiers' and Airmen's Home, and consistent with a September 1984 order of the District Court in AFGE v. FLRA, No. 83-2973 (D.D.C., Sept. 24, 1984), the FLRA has applied the stay provisions of its rules to requests for stays of arbitration awards. Therefore, no further implementation of the decision of the Court of Appeals would seem to be required. As to the policy question which remains--namely, whether the FLRA will proceed to amend its rules by deleting the provision for stays of arbitration awards and rely upon the statutory provisions as interpreted by the FLRA in Soldiers' and Airmen's Home--that is currently being reviewed by the Members.

For additional background information relating to stays of arbitration awards, please see the attached Appendix.

Attachment

APPENDIX

INTRODUCTION

Under § 7122(a) a party to arbitration may file with the FLRA an exception to an arbitrator's award contending that the award is deficient as contrary to law, rule, or regulation or on grounds applied by Federal courts in private sector labor-management relations. If the FLRA finds the award deficient, it may set it aside or modify it. If it is not found deficient, the FLRA will deny exceptions. Section 7122(b) provides that if no exceptions to an award are filed within the statutorily prescribed time period, "the award shall be final and binding," and further provides that "[a]n agency shall take the actions required by an arbitrator's final award."

STAYS OF ARBITRATION AWARDS

The question is whether the filing of timely exceptions to an arbitration award temporarily relieves the party from complying. This question has been complicated and clouded by a provision in the FLRA's regulations providing for stay of arbitration awards. When the FLRA issued its interim rules and regulations in 1979 and its final rules and regulations in 1980, § 2429.8 provided for the stay of arbitration awards. The provision, which is still part of the FLRA's regulations, provides:

(a) a request for a stay shall be entertained only in conjunction with and as a part of an exception to an arbitrator's award filed under part 2425 of this subchapter. The filing of an exception shall not itself operate as a stay of the award involved in the proceedings.

(b) a timely request for a stay of an arbitrator's award to which an exception has been filed shall operate as a temporary stay of the award. Such temporary stay shall be deemed effective from the date of the award and shall remain in effect until the Authority issues its decision and order on the exception, or the authority or its designee otherwise acts with respect to the request for the stay.

(c) a request for a stay of an arbitrator's award will be granted only where it appears, based upon the facts and circumstances presented, that:

(1) there is a strong likelihood of success on the merits of the appeal; and

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(2) a careful balancing of all the equities, including the public interest, warrants issuance of a stay.

In 1981 the FLRA published a proposed revision of its rules and regulations which would have provided that the timely filing of an exception to an arbitration award with the FLRA will automatically serve to stay that award until the FLRA resolves the exception. The reason for proposing such a change was the belief that such a revision would more accurately comport with the language and intent of the Statute.

However, the FLRA decided to withdraw the proposed revision because most of those who commented did not favor it primarily because of a fear that it would encourage the filing of exceptions designed simply to delay compliance with awards.

Before and after publication of the proposal to change the regulations, the FLRA relied on the provision in this regulation that a timely request for a stay does operate as a "temporary stay" which remains in effect "until the Authority issues its decision and order on the exceptions, or the Authority or its designee otherwise acts with respect to the request for a stay." Consequently, the FLRA for the first 5 years of its existence, never either granted or denied a "permanent" stay request but instead, while the "temporary" stay was in effect, adjudicated the merits of each case and rendered a final decision on the exceptions themselves.

This practice permitted the FLRA to devote its resources to issuing the final decision on the merits of the exceptions as promptly as possible. However, if a party opposing a stay request could bring special factors to the FLRA's attention which, in the FLRA's view, warranted prompt consideration of a stay request, such consideration would be undertaken and the stay request could either be promptly acted on, or the case could be accorded expedited treatment in order to issue a final decision more quickly than would normally have been the case. In such situation the FLRA invariably opted to expedite issuance of a final decision. Special factors which would warrant such treatment were primarily a showing of harm to the grievant(s), if a temporary stay was permitted to remain in effect, which harm would be difficult or impossible to remedy in the absence of a denial of the stay request; and secondarily, a substantial indication that the exceptions were baseless, and may have been filed solely for the purpose of delaying implementation of the arbitrator's award pending appeal to the FLRA.

THE DISTRICT COURT DECISION REGARDING STAYS IN AFGE v. FLRA

AFGE challenged this practice regarding stays in the District Court for the District of Columbia in October 1983. Judge Harold Greene ruled that the FLRA is required under the APA to decide matters presented to it, including stay requests, within a reasonable time. The Court found that the FLRA's practice of not explicitly ruling on stay requests on an interlocutory basis is contrary to the APA and ordered the FLRA to "promptly decide all pending requests for stays submitted to it in connection with its review of arbitration awards" and to "develop and publish a procedure for the disposition of future stay requests." Judge Greene's order was received by the FLRA only 24 days after Member Frazier had become Acting Chairman of the agency. The FLRA acted immediately to comply with the Court's instructions. By October 29, 1984, the FLRA staff had drafted and the FLRA approved and published in the Federal Register a procedure for the disposition of requests to stay arbitration awards. On December 26, 1984, the FLRA reported to the court that it had issued orders resolving all requests for such stays over which the FLRA had jurisdiction and which were pending and ready for decision as of October 1, 1984. There were about 76 such requests. The FLRA has continued since that time to take prompt interlocutory action on requests for stays of arbitration awards.

FLRA DECISION IN SOLDIERS' AND AIRMEN'S HOME CASE

On June 26, 1984, prior to Judge Greene's decision in the District Court but while that law suit was pending, the FLRA Members (consisting of Chairman Mahone, Member Haughton and Member Frazier) unanimously held in Soldiers' and Airmen's Home (15 FLRA No. 26) that where timely exceptions to an arbitration award have been filed the award is not "final and binding" within the meaning of section 7122(b) of the Statute pending the FLRA's resolution of those exceptions. Therefore, the FLRA held that the agency's noncompliance with the award pending the FLRA's resolution of the agency's timely filed exceptions was not an unfair labor practice and hence did not violate the Statute.

The FLRA found that this conclusion as to when the Statute confers final and binding status, for compliance purposes, on an arbitration award is supported by the legislative history of § 7122(b). The House bill, as reported out of Committee, contained a § 7122(b) very much like the provision eventually enacted. This section found an arbitrator's award to be "final and binding" if "no exception . . . is filed" The

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Committee Report accompanying the House bill stated that § 7122(b) requires agencies to "take the actions required by the final award of an arbitrator" and that an award is "final and binding" if "no exception is filed[.]"

Subsequently, when the House-Senate Conference Committee reported the final version of § 7122(b), their Report stated:

the House provides that if no exception to an arbitrator's award is filed with the Authority, the award "shall be final and binding" (Section 7122(b)). The Senate contained no comparable provision. The conferees adopted the House provision. The intent of the House in adopting this provision was to make it clear that the awards of arbitrators, when they become final, are not subject to further review by any other Authority or administrative body, including the Comptroller General. [Emphasis added.]

The FLRA expressly relied on this Congressional language in its decision in Soldiers' and Airmen's Home as strongly supporting the FLRA's reading of the Statute's plain language. The FLRA concluded this Conference Report language explicitly establishes that Congress intended that awards "become" final and binding for compliance purposes at that point which review of the award is no longer available. The language in the Congressional Conference Report also was relied upon to support the FLRA's reading of the Statute as intending to enforce compliance with an award through ULP proceedings when arbitration review proceedings under § 7122 are either completed or not timely invoked.

The FLRA's decision was intended to give effect to the arbitration scheme of the Statute. Thus, under the FLRA's interpretation of the Statute a party must comply with an award when the party has not invoked the exceptions process set forth in § 7122, and likewise must comply when it has filed exceptions to an award and the FLRA has denied those exceptions. However, a party does not violate the Statute when it does not comply with an award when it has timely invoked the process established by Congress excepting to the award, and the exceptions are pending with the FLRA. The FLRA believed this interpretation gives full effect to the scheme for binding arbitration and for review of exceptions to arbitration awards set forth in the Statute.

The Administrative Law Judge in Soldiers' and Airmen's Home whose decision was adopted by the FLRA pointed out that the underlying theory of the complaint in the case could produce

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incongruous results. That is, an agency could be found guilty of an unfair labor practice for refusal to obey an arbitrator's award pending resolution of exceptions by the FLRA, even though the resolution of the exceptions might, under § 7122(a), result in the setting aside or modification of the award by the FLRA. Thus, under the theory of the complaint, an agency could be found to have committed an unfair labor practice for failure to comply, and also be absolved from any responsibility to comply with the award because of a favorable determination in the separate appeal of the arbitration award.

PROPOSED CHANGE IN FLRA'S STAY REGULATIONS

Based upon the FLRA's decision in Soldiers' and Airmen's Home it became unnecessary and redundant for a party filing exceptions to an award to also file a request for a stay of the award. Consequently the FLRA in November 1984 published for comment a proposed amendment to its rules which would rescind as unnecessary the provision for stay of arbitration awards. By so deleting the provision for stays, the procedure for processing exceptions to arbitration awards would thereby be simplified and such cases would therefore require less processing time at the FLRA.

DECISION OF THE COURT OF APPEALS IN SOLDIERS' AND AIRMEN'S HOME

In the meantime, the decision in Soldiers' and Airmen's Home had been appealed to the Court of Appeals for the District of Columbia Circuit. In its brief on the appeal, the FLRA informed the court that it had published the proposed change in the Federal Register and stated that "the Authority does not intend to take any final rulemaking acting pending the court's decision in [the Soldiers' and Airmen's Home] case."

Judge Greene of the District Court also had been informed of the FLRA's decision in the Soldiers' and Airmen's Home case and subsequently, of its appeal to the Court of Appeals for the D.C. Circuit and of the FLRA's proposed rulemaking rescinding the provision for stay of arbitration awards. He likewise was informed of the FLRA's intention not to take any final action on the proposed rulemaking until the Court of Appeals decided the appeal in the Soldiers' and Airmen's Home case.

When the Court of Appeals heard arguments in the Soldiers' and Airmen's Home case, Judge Harold Greene, who had heard the related matter in the District Court, sat by designation pursuant to 28 U.S.C. § 292(a). Judge Greene filed the opinion

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for the Court of Appeals in the Soldiers' and Airmen's Home case.

The Court concluded that the language and legislative history of the Statute are ambiguous as to whether an arbitration award that has been timely excepted to under § 7122 is final and binding for compliance purposes under that section, while exceptions are pending before the FLRA. The Court concluded further that, while the Statute may not require the conclusion that awards are final and binding and must be complied with while exceptions are filed, unless stayed by the FLRA, the conclusion is not prohibited by the Statute.

Finally, the Court held that the FLRA's construction of § 7122(b) in this case could not be sustained in light of the FLRA's contrary interpretation of the Statute as embodied in the stay regulation which the FLRA had elected not to rescind pending the Court's decision in Soldiers' and Airmen's Home. Thus, the FLRA, by deferring any final action on the proposed rulemaking before the Court of Appeals decided the appeal in the Soldiers' and Airmen's Home case, was caught in a difficult situation. The Court stated on the one hand that the FLRA could not effectively repeal its stay regulation in an adjudicatory proceeding such as the present case. But on the other hand, the FLRA was confronted with the issue, which it was required by law to decide in the adjudicatory context of Soldiers' and Airmen's Home, of whether an arbitration award to which exceptions are taken is final and binding for compliance purposes while the exceptions are pending. Further, the FLRA was a defendant in the separate District Court action before Judge Greene to a suit challenging the FLRA's application of its stay regulation, and eventually was ordered by Judge Greene in that case to issue orders resolving stay requests under that regulation. Any rulemaking action by the FLRA to rescind the stay regulation, without a firm legal basis such as a decision by the Court of Appeals in Soldiers' and Airmen's Home, would under such circumstances have likely raised serious legal questions concerning the FLRA's conduct in that District Court proceeding.

In conclusion, the Court of Appeals stated that the FLRA is entitled to seek to alter its established regulation and interpretation of section 7122(b), which . . . is sufficiently ambiguous to permit both the FLRA'S traditional construction and its newly advanced one.

However, this action must be taken by following rulemaking procedures, not by adjudication as was done here, the Court ruled.

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As indicated at the outset the FLRA has carried out the direction of the Court of Appeals with respect to the respondent Soldiers' and Airmen's Home and continues to apply the stay provisions of its rules as directed by Judge Greene in the District Court. As to the policy question which remains as a result of Judge Greene's decision in the Court of Appeals--namely, whether the FLRA will proceed through formal rulemaking to amend its rules by deleting the provision for stays of arbitration awards and relying upon the statutory provision as interpreted by the FLRA and permitted by the Court of Appeals in Soldiers' and Airmen's Home is currently being reviewed by the Members of the FLRA.

QUESTION 3 BY SENATOR GLENN:

When Congress enacted the Civil Service Reform Act and the FLRA, their purpose was to improve the efficiency of the Federal service, but another purpose was to improve labor relations. The FLRA is charged with administering a program which affects union-management relationships. Much of this work is negotiating problems and constructively working them out. According to the SFLRP survey 58% of those responding said that the FLRA had too restrictive a view to collective bargaining; 39% felt that FLRA opinions were poorly written or unclear as to legal principles and 41% said decisions were too varied in their clarity to describe; and 70% felt that FLRA negotiability decisions were seldomly timely. Sir, how do you explain this failure to even minimally meet the standards of your mandate? How do you plan to change this trend?

ANSWER:

Congress found, when enacting the Statute, that statutory protection of the right to bargain collectively "facilitates and encourages the amicable settlements of disputes between employees and their employers involving conditions of employment." I have always fully supported the voluntary resolution of problems and disputes through such negotiations between the parties.

However, under the Statute the scope of negotiations is limited. In general, unions and Federal agencies must negotiate over terms and conditions of employment, unless a bargaining proposal is inconsistent with existing Federal law, rule, or regulation. See §§ 7103(a), 7113, 7116, and 7117(a). The Statute excludes certain management prerogatives from the scope of negotiations, although an agency must bargain over the procedures by which these management rights are exercised and over appropriate arrangements. See § 7106.

When a dispute arises between a Federal agency and a union representing employees of that agency as to whether a union bargaining proposal is within the scope of bargaining, the matter is brought to the FLRA for decision. The decision of the Members is subject to judicial review.

The SFLRP survey in which 19% (122 of 655 members) of the membership responded revealed that by a 2 to 1 margin the 52 management members believed that the FLRA's decisions are either an accurate view or too broad a view of the scope of bargaining, while the 36 union members who responded almost unanimously believed on the other hand that the FLRA's decisions are too restrictive. Your question asks me to

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explain "this failure to even minimally meet the standards of your mandate."

As to my view of the agency's mandate and my mandate as a Member, I would like to quote from an address which I made to an AFL-CIO audience in January 1979:

When a dispute arises between an agency and a union over the meaning and application of the Statute, the Authority will resolve that dispute by interpreting the words of the Statute in light of the policies reflected in the Statute, the stated purposes of the Statute, and the intent of Congress with respect to the particular provision in dispute.

To ascertain Congressional intent, we will attempt to reconstruct the sometimes tortuous path which the particular provision in dispute took through the legislative process--from the introduction of the bills in the House and Senate, through committee hearings, to the bills as reported out of committee in both Houses together with the reports of those committees--through the floor debates and the passage of bills in the respective Houses to the conference committee's report and the final bill as enacted into law.

In a word, the FLRA is interested in what Congress intended, not in what agencies or unions wish Congress had intended and not in what agencies or unions think what the law ought to be. We are interested in what the law is. And in making that judgment, it matters not a whit what you or I or any other individual thinks the law ought to be.

As John Adams first wrote in the Massachusetts Constitution and as John Marshall later emphasized in one of his decisions: "Ours is a Government of laws, not of men [and if I may add a 20th Century footnote--not of women either]." If we do not like a particular law, our recourse is to ask Congress to change it.

Let me reemphasize that in making decisions about the meaning and application of the Statute that the FLRA is an independent and neutral third-party agency. Our role is not to promote labor's interests nor to promote management's interests. Our role is to promote a viable labor-management relationship to insure that parties to that relationship--unions and agencies--can resolve their mutual problems bilaterally, within the statutory framework established by Congress and the President." [Emphasis added.]

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I can assure you that that is exactly what I have striven to do and would continue to strive to do if I were to be confirmed as a Member of the Federal Labor Relations Authority.

In a word, the FLRA must be concerned with what Congress intended. That is, we must be faithful to the law. Only in that way, I believe, can we insure our role as an independent and neutral agency.

With all due respect to the SFLRP and the results of its survey, I cannot permit the results of such a public opinion poll as to the relative restrictiveness of past interpretations to affect my future interpretation and application of the Statute in the resolution of negotiability disputes. Consideration of the results of opinion polls would clearly be contrary to the mandate of the FLRA and its Members as I perceive that mandate. If a party disagrees with an FLRA decision in a negotiability case, its recourse is to the courts and ultimately, to the Congress, if the courts sustain the FLRA's reading of the Statute. The courts, and ultimately Congress, not public opinion polls, must have the final word.

I should point out that as of June 1, 1986, the Authority had closed more than 4,300 cases, with approximately 3,000 constituting substantive decisions by the Members. Of those, approximately 1,500 were subject to judicial review. As of June 1, of the decisions which were appealed, 297 had been closed by the courts. Of those the FLRA's decision was modified or set aside in only 56 cases.

To the extent that labor and neutral representatives may have perceived, at least at the time of the poll, that the FLRA's decisions reflected too restrictive a view of the scope of bargaining, a partial explanation may be found in the decisions which the FLRA issued and those which it did not issue during the last three quarters of FY 1985.

Since the FLRA had only two Members during FY '85, it was possible to close cases only where my fellow Member and I could reach agreement. The general position which I took and I so advised my staff was that I intended to continue to decide cases as I always had--based on the literal language of the Statute and its meaning as reflected in the legislative history and its stated policies and purposes. Further, I did not wish to reverse or depart from established FLRA case precedent unless, of course, it had been reversed by the courts or been altered through legislative action by the Congress. Within those parameters I worked with my fellow Member during the last three quarters of FY '85 to issue decisions knowing that the House Oversight Subcommittee, the courts, unions and agencies

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were looking to us for decisions on as many pending cases as we could issue. He and I did not agree on every issue; no two people could ever be expected to but we did find 491 substantive cases of all types on which we could agree within the parameters which I set for myself.

In the negotiability area my fellow Member and I were able to reach agreement in 110 cases. However, as the GAO reported, an additional 99 negotiability cases were in abeyance.

Within the parameters which I had set for myself and which I described earlier, where law and precedent led to the conclusion that a proposal was nonnegotiable and the staff so recommended, my fellow Member and I generally agreed. However, where law and precedent led to the conclusion that the proposal was negotiable, the staff so recommended, and I so agreed, my fellow Member generally did not and so the matter was deadlocked. Therefore, in about 90 percent of the issued decisions during this period, some or all of the proposals were found nonnegotiable. Conversely, in a fairly large number of cases where I voted to find a proposal negotiable, my fellow Member did not and those cases as well as others presenting the same issue were placed in abeyance.

I am happy to report to this Committee that the situation has changed dramatically in recent months. Although we continue to date to have only two Members because the third Member, who was a recess appointee, was not confirmed, Chairman Calhoun and I quickly discovered that we were in close agreement on many negotiability cases which had been in abeyance. On a large number of issues, the votes were no longer 1 to 1 but instead were 2 to 0. Consequently, Chairman Calhoun and I joined to issue decisions in many of these cases. Included were lead decisions on the negotiability of travel and per diem for union negotiators (which we found negotiable) and the negotiability of appropriate arrangements for employees adversely affected by the exercise of management rights wherein we adopted the "excessive interference" test.

As to the timeliness and clarity of negotiability decisions, the FLRA has always striven to issue decisions which are well reasoned, clear and timely. Unfortunately, given the limitations of staff resources and heavy workload the agency has not always been able to reach the ideal goal.

An excessively large case inventory developed in the early years of FLRA's existence and delays in case processing resulted. However, in more recent years that problem has been addressed and the case inventory substantially reduced. With the reduction in the pending case inventory, we have been able

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to begin to reduce the amount of time required to process more recently filed cases.

Soon after I became Acting Chairman of the FLRA on September 1, 1984, the Chairwoman of our House Oversight Subcommittee wrote me to request a report on what steps I planned to take to deal with case processing problems at the FLRA. In my reply to her, which is attached, I outlined the causes of the case processing problems at the FLRA and the actions which had been taken or which we were planning to take to alleviate those problems.

Briefly, to recapitulate, as to some of the causes of this problem: After the Statute became law in January 1979, the FLRA Members faced the typical difficulty of a new agency--too much work to do and insufficient resources to do that work. When Congress enacted the Civil Service Reform Act, we were provided no hiatus or interim period between the administration of the old Executive Order and the administration of the Statute. We had to move from the one to the other overnight, clearing up a backlog of about 1,000 cases transferred to the FLRA from the Assistant Secretary of Labor (contrary to AFGE's contention, these 1,000 cases did not come from the FLRC where I served) and about 100 additional cases transferred from the FLRC. At the same time, we had to prepare substantive and procedural regulations to carry out the requirements of our Statute; solicit comments and revise the regulations, as necessary; and publish them in final form so that we could begin processing cases under the new Statute.

Meanwhile, our problems were rapidly compounded by a large and increasing caseload. To give you some indication, during our first 2 years and 9 months of operations (through FY '81), we received at the Headquarters-level over 2,000 cases. In the field the General Counsel received a whopping 13,500 ULP charges over the same period. Great numbers of these cases presented issues of first impression under the Statute and, therefore, they required careful consideration by the FLRA. Unlike the NLRB, we did not have the benefit of 4 to 5 decades of agency and court precedent to help us resolve cases. The FLRA was and, to a great extent, still is in its formative years in terms of the development of case precedent, particularly judicial precedent.

In the FLRA's early years resources were not sufficient to get the job done well. In FY '79 the agency was authorized 278 full-time permanent positions. In preparing the FY '80 budget OMB itself recognized the need for additional staffing to meet our goal of issuing quality decisions on a timely basis. In the initial FY '80 budget submission OMB sought funds to support 452 full-time permanent positions for the FLRA.

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However, the FLRA was finally authorized only 352 such positions for FY '80. The number of the FLRA's authorized positions never came close to reaching the number OMB itself recognized the agency needed to get its job done well. The number of authorized positions was never higher than 363 (FY '81) and the agency's actual strength never exceeded 358 (June 30, 1981).

Since FY 1981 the authorized "FTE" staffing (full-time equivalent workyears) for the FLRA has gone down every year:

FY '82	322
FY '83	312
FY '84	308
FY '85	306
FY '86	292

I should make it clear that these figures represent the total staffing authorized for the entire agency: the national headquarters of the agency, including personnel to process cases and to provide administrative support; the General Counsel, including both headquarters and regional offices throughout the country; and the Federal Service Impasses Panel.

When the FY '82 budget reductions came along, we were faced with a funding crisis of extreme proportions. We were forced to run a major reduction-in-force (affecting about 20 percent of our employees) and we also had to reduce all discretionary spending virtually to "zero." This came at a time when the case filings had been showing steady increases over each year of our existence.

All of these events combined to place us in a hole, from a case processing standpoint; we thereafter expended much time and energy trying to "dig out" of that hole.

I was happy to report in my reply to Chairwoman Schroeder that in Fiscal Year '84 the FLRA had been able, through various management and employee productivity improvements to close 750 cases. That figure represented at that time the highest number of cases closed in a year, by over 100, since the inception of the FLRA. This achievement was highlighted in a press release which I issued at the time and which is attached. I have also attached a letter from Member McGinnis in which he complimented me some 7 months later for continued efforts to improve the efficiency of the agency.

We did our best to ensure progress for the next Fiscal Year and on October 1, 1985, I was pleased to issue as Acting Chairman of the FLRA another release in which I announced that the FLRA

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had just set new records and completed the most productive year in its history. That release is also attached.

I pointed with pride to the fact that the FLRA in Fiscal Year 1985 closed the largest number of cases ever in a single year--822 cases--thereby reducing the number of pending cases from 737 at the beginning of the Fiscal Year to 460 at the end. This reduction was accomplished even though 545 new cases were filed with the FLRA during the same period. Both the General Accounting Office and the U.S. Court of Appeals for the District of Columbia Circuit have acknowledged this achievement.

There were a number of reasons for this accomplishment. During Fiscal Years 1984 and 1985 we took a series of management improvement initiatives to increase the efficiency and productivity of the agency. Among these initiatives were organizational changes and the elimination and/or compressing of levels of review; increasing the availability of electronic legal research tools; utilizing special "task forces" to concentrate on the resolution of older cases; standardization of the format of decisions to the maximum extent; refinement of the computerized case tracking system, including increasing the capability of our automated data base, to permit the early identification and resolution of case processing problems and to enhance the overall management of the caseload and the allocation of resources; and additions of word processing equipment and improvements in its use. Furthermore, many cases were being processed faster than in the past because they could be resolved on the basis of the FLRA precedent developed during the first 5 years of its existence. But, the most important factor was and still is the renewed determination of personnel at all levels within the agency to eliminate the "backlog" so that all cases can be actively processed through the case management system on a timely and current basis.

I believe the FLRA is at long last reaching the point where cases can be assigned and work can begin on them immediately after all documents have been filed by the parties. I hope that the elimination of so much of the older case backlog while I was Acting Chairman will enable us now to develop a smoothly functioning process so that cases will move in a steady stream through the FLRA and decisions will issue in less time than in the past.

On June 11, 1986 under the direction of the Executive Director of the FLRA, the agency implemented a temporary team structure to better handle the remaining inventory of cases filed before April 1, 1986, otherwise known as "target" cases. The goal is to adjudicate by the end of FY '86 all cases filed before April 1, 1986 and thereafter to resolve as many cases as possible within similar time frames.

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Among the actions taken to improve the clarity of our decisions recently has been the creation of a new outline-type format with sections and sub-sections for our decisions to help the reader better comprehend the issues and our analysis and conclusions--somewhat the way U.S.A. Today helps the reading public better understand the news. We have also recently changed the typeface of our issued decisions from elite to the larger pica for easier readability. In addition a writing course has been offered this summer for the professionals on the staff to try to improve the clarity of our decisions.

But, of course, in a highly specialized area such as the Federal sector labor-management relations program, bound and intertwined as it is with Title 5 of the U.S.Code and the many other statutes and regulations that govern working conditions, that task is not always simple.

We necessarily write for many audiences: the Federal courts which review our decisions; the labor lawyers and labor relations experts who bring the issues to us for decision; Federal personnel officers and union leaders who must apply our decisions to other situations as they arise throughout the Federal workforce; and rank-and-file workers and employee representatives such as shop stewards and local union officers who face similar problems every day. To strike the proper balance among these audiences is not a simple task.

In summary, within our given resources, the FLRA has striven to find ways to improve the timeliness and the clarity of its decisions. I firmly believe that past initiatives have brought the agency to the point where current productivity efforts will result in the more timely resolution of cases. As decisionmaking becomes current, we can turn our efforts more and more to the clarity of the decisions.

Attachments



UNITED STATES OF AMERICA
FEDERAL LABOR RELATIONS AUTHORITY

WASHINGTON, D.C. 20424

October 9, 1984

OFFICE OF THE CHAIRMAN

Hon. Patricia Schroeder
Chairwoman, Committee on Post Office
and Civil Service
Subcommittee on Civil Service
House of Representatives
Washington, D.C. 20515

Dear Madam Chairwoman:

I am writing in response to your letter of September 13, 1984, concerning case processing at the Federal Labor Relations Authority. I agree with you that we must reduce the amount of time that it takes the Authority to process cases in order to better facilitate healthy labor-management relations in the Federal Government. I am pleased that the General Accounting Office has recognized in its report that the Federal Labor Relations Authority has already taken actions to improve case processing and that you are aware of the success that we had with the Arbitration Task Force. I appreciate this opportunity to update you on other actions the Authority is and will be taking to make additional improvements in case processing.

First, I would like to review the background on how our case processing problems developed, some of which you may recall. After the Statute became law in January 1979, the Authority Members faced the typical difficulty of a new agency—too much work to do and insufficient resources to do that work. We began with about 1,000 Assistant Secretary cases and about 100 Federal Labor Relations Council cases left over from the Executive Order program. Meanwhile, our problems were rapidly compounded by a large and increasing caseload under the Statute. To give you some indication, during our first 2 years and 9 months of operations (through FY '81), we received, at the Authority-level, over 2,000 cases. In the field the General Counsel received 13,500 ULP charges over the same period. Naturally, great numbers of these cases presented issues of first impression under the Statute and therefore required careful consideration by the Authority.

When FY '82 came along, we were faced with a funding crisis of extreme proportions. We were forced to run a major reduction-in-force (affecting about 20 percent of our employees) and we also had to reduce all discretionary spending virtually to "zero." This came at a time when the case filings had been showing steady increases over each year of our existence.

All of these events combined to place us in a hole, from a case processing standpoint; we are still trying to "dig out" of that hole. The past year

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has been marked by a concentrated effort to reduce the backlog of cases at the National Office. I am happy to report that the Authority has made some significant progress in this regard. This has been accomplished through a number of initiatives including a reorganization to improve the management of case processing; several productivity improvement initiatives involving significant employee participation, such as the Arbitration Task Force to which you refer; delegations of authorities designed to better balance the agency's workload; the allocation of resources to better meet workload priorities; and administrative improvements brought about as a result of the Civil Service Miscellaneous Amendments Act of 1983. The result has been a 40 percent increase in cases closed in FY '84 compared to FY '83 and a corresponding 16 percent reduction in case inventory or backlog.

The participative approach taken by the Arbitration Task Force has been made a permanent part of the case handling process; that is, in the processing of representation, unfair labor practice, and negotiability as well as arbitration cases, layers of review have been reduced and broad employee participation in the decision research and recommendation process has been instituted. Where possible, we have shortened decision formats for all cases produced by the teams involved. The result has been an increased flow of draft decisions from staff to the Members of the Authority nearly double the rate of a year ago.

Earlier this year we created an Office of Case Management to monitor and remove obstacles to the expeditious flow of cases. We are currently doubling our computer capability to track and move cases. We have moved professional staff resources to the Office of Chief Counsel to meet workload priorities in case handling.

Currently, all arbitration cases ready for processing are assigned and being processed; negotiability cases are being resolved on an average of 150 days from the day staff members begin work on them; major policy issues are being identified immediately and given expedited treatment; and we have delegated decision-making authority to the General Counsel in representation cases. On this latter point, the Authority expects to have cleared its docket of all representation cases more than 60 days old during FY '85. We amended our regulations to provide that a decision of an Administrative Law Judge in an unfair labor practice case becomes the decision of the Authority, without precedential value, where no exceptions are filed. This procedure has resulted in dispositions of over 130 cases to date without any major Authority involvement since its institution.

This past fiscal year (FY '84) the National Office closed, through various management and employee productivity improvements, 750 cases. That figure represents the highest number of cases closed, by over 100, since the inception of the FLRA. The current inventory of cases stands at 737 as we move into FY '85, which represents, with the current rate of receipts and current staff resources, about a year of work at the Authority. With continued productivity improvements, we can forecast further reduction of

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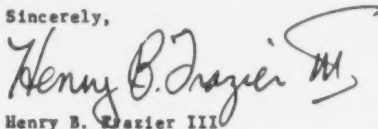
the inventory to 650-700 cases by the end of FY '85. That is progress, but we want to do better.

We have developed a plan to reduce the 737 current cases on hand to an acceptable inventory level. The plan calls for the temporary augmentation of the staff of the Authority. It includes a resource request for 12 additional full-time equivalent staff years for FY '86 and FY '87, following which the Authority's staff resource level would be returned to the present level through attrition. This temporary increase in resources would enable us to reduce our case backlog to an "acceptable" inventory of about 250 cases by the end of FY '87. A 250-case inventory would represent about a 120-day output level, which is the ultimate goal we are seeking, and one which coincides with the view you expressed in your letter.

As you know, we have solicited the views of unions, agencies, and other interested individuals as to how our case processing procedures and methods might be improved even further. On June 20 of this year, we published in the Federal Register an announcement soliciting comments from various parties in an effort to identify modifications which would improve case processing. While this was prompted in part by recommendations which we had received from the Defense Department and from four of the major Federal unions, the solicitation for methods and procedural improvements was unanimously supported by the Members of the Authority and the professional staff. All submissions have now been received, over a hundred separate proposals in toto, and a "Methods and Procedures Review Group" has been established with key staff representatives from the Authority's National Office, the Office of Administrative Law Judges, the Office of General Counsel, and the Federal Service Impasses Panel. The group has already begun the categorization and research on each of the proposals submitted and will be making recommendations to the Authority, the General Counsel, and the Chairman of the FSIP, for issues to be taken up in an open meeting. We are confident that further improvements will result from this comprehensive review and look forward to sharing with you the results of the process when completed.

In summary, we are taking every possible approach to capitalize on the opportunities available to the Authority to speed up its case processing and are viewing the potential quite optimistically. We are hopeful that we can continue our progress through the transition in membership of the Authority and perhaps do even better when the full, new contingent of Authority Members is "on board." We will continue to keep you apprised of developments.

Sincerely,



Henry B.razier III
Acting Chairman



Federal Labor Relations Authority

News Release

500 C Street, SW.
Washington, D.C. 20424

IMMEDIATE PRESS RELEASE

October 5, 1984

Henry B. Frazier III, Acting Chairman of the Federal Labor Relations Authority, announced today that the agency has just completed its most productive year in resolving labor disputes cases arising in the Federal workplace.

The Authority provides leadership in establishing policies and guidance relating to labor-management relations in the Federal service primarily through its determination of appropriate units for labor organization representation, its resolution of exceptions to arbitrator's awards, its resolution of complaints of unfair labor practices, and its determination of issues appropriate for negotiation.

For the fiscal year which ended on September 30, the Authority's National Office issued 750 decisions, exceeding by more than 100 any previous year in the agency's nearly 6 years of existence. "We've completed a very successful year," Acting Chairman Frazier said, "and I attribute the progress we've made in reducing our inventory of cases to improvements in our case processing system and to the dedication and perseverance of the talented people at the Authority. They have worked hard to achieve this level of effort, and they recognize the challenging job ahead of us to continue to improve the timeliness of our decisions. We shall do our best to ensure that progress will continue."



Federal Labor Relations Authority

Washington, D.C. 20424

IMMEDIATE RELEASE

October 1, 1985

AUTHORITY COMPLETES MOST PRODUCTIVE YEAR EVER

The Federal Labor Relations Authority in Fiscal Year 1985 closed the largest number of cases ever in a single year, Acting Chairman Henry B. Frazier III, announced today. Between October 1, 1984 and September 30, 1985, the Authority closed 822 cases thereby reducing the number of pending cases from 737 at the beginning of the fiscal year to 460 at the end. This reduction was accomplished even though 345 new cases were filed with the Authority during the same period.

According to Frazier, "This continues the trend which was begun in the previous fiscal year when the Authority closed 750 cases. In addition to having just completed our best year ever, during FY '85 we also had our best first quarter of any fiscal year when we closed 211 cases and our best quarter of any quarter ever, when, during the third quarter, we closed 268 cases. The production during the first quarter gave us a head start on the year and the tremendous effort during the remainder of the year pushed us over the top. This accomplishment enabled the agency to exceed its goal of closing 780 cases, a goal which was established during the development of agency objectives before the year began."

"I believe the Authority is at long last reaching the point where cases can be assigned and work can begin on them immediately after all documents have been filed by the parties. I hope that the elimination of so much of the older case backlog will enable us now to develop a smoothly functioning process so that cases will move in a steady stream through the Authority and decisions will issue in less time than in the past. I attribute this outstanding achievement to dedication and hard work of everyone at the Authority," Frazier said.

Frazier added, "Over the past couple of years we have made every effort to increase the efficiency and productivity of the agency through a series of management improvement initiatives involving personnel in every aspect of our operations. Among these initiatives were organizational changes and the elimination and/or compressing of levels of review; increasing the availability of electronic legal research tools; utilizing special 'task forces' to concentrate on the resolution of older cases; standardization of the format of decisions to the maximum extent; refinement of the computerized case tracking system, including increasing the capability of our automated

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data base, to permit the early identification and resolution of case processing problems and to enhance the overall management of the caseload and the allocation of resources; and additions of word processing equipment and improvements in its use. Furthermore, many cases are being processed faster than in the past because they can be resolved on the basis of the extensive precedent developed during the first five years of the Authority's existence. But, the most important factor has been the renewed determination of personnel at all levels within the agency to eliminate the 'backlog' so that all cases can be actively processed through the case management system on a timely and current basis."

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UNITED STATES OF AMERICA
FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C. 20414

May 23, 1985

OFFICE OF THE MEMBER

Honorable Henry B. Frazier III
Chairman
Federal Labor Relations Authority

Dear Hank:

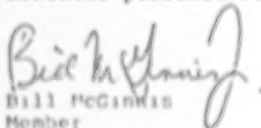
It has now been approximately 5 months since you were kind enough to swear me in as a Member of the Federal Labor Relations Authority. In that time I have come to know and respect you for your excellent knowledge of the Statute and the Federal Labor Relations System.

Your expertise, consideration, and devotion to this Agency are indeed commendable.

I wanted you to know how much I have appreciated all of the assistance you have given to me to date.

I look forward to working with you in the future and I congratulate you on the many initiatives you have introduced to improve the effectiveness, the efficiency, and ability of this Agency to meet the needs of the taxpayers of the United States and the regiments that we serve.

Kindness personal regards,


Bill McGinnis
Member



UNITED STATES OF AMERICA
FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C. 20510

July 25, 1986

OFFICE OF THE MEMBER

Honorable William V. Roth, Jr.
Chairman
Committee on Governmental Affairs
United States Senate
Washington, D.C. 20510

Dear Mr. Chairman:

I respectfully request permission to submit for the record certain information to clarify matters which were raised by witnesses at my confirmation hearings on July 16 and 17, 1986.

On July 23, 1986, I submitted to you certain additional written information requested by some Senators at my hearings. The witnesses who appeared in behalf of the American Federation of Government Employees and the National Treasury Employees Union to object to my confirmation made a number of allegations which I was able to respond to in my July 23 submission. However, as to the other allegations, I did not have an opportunity to respond fully to them. These allegations deserve a response in order to correct certain factual errors and to clarify the record on these matters. My additional responses are enclosed. I would appreciate any consideration you may give my request to make them part of the record.

Sincerely,

A handwritten signature in dark ink, reading "Henry B. Hrazier III". The signature is stylized with a large, sweeping "H" and a trailing flourish.

Henry B. Hrazier III
Member

Enclosures

- I. Both NTEU and AFGE cite court decisions wherein decisions of the FLRA have been reversed and the courts have been critical of the FLRA's reasoning.

RESPONSE:

In contrast to the cases cited by AFGE and NTEU, in the many cases where Authority decisions have been upheld and enforced, the courts have commented favorably on Authority decisions. For example, the courts have variously said:

- o Since the Authority's decision is consistent with the Act and its legislative history, with analogous private sector case law, and with important considerations of public policy, we enforce in full the Authority's order.
- o The union's constrictively literalist construction of section 7106(a) would permit collective bargaining over literally all personnel qualifications We find this interpretation to be unsupportable Indeed, the union view would so thoroughly subordinate section 7106(a) to section 7106(b) as to read the former effectively out of the Statute. . . . The Authority's construction of the statutory language and its application of that construction to the proposals before it, accord far better with the teaching of these canons. . . .
- o We are convinced that the FLRA's ultimate decision . . . was not contrary to law, but rather was wholly correct. . . . The [FLRA] interpretation in this case easily passes appellate review.
- o We find that these conclusions [by the FLRA] are not only reasonable, but are compelled by the plain language of the Statute Furthermore, there is absolutely nothing in the legislative history or in any case law construing the Statute to support the union position.
- o Given these manifestations of legislative intent, we simply cannot say that the Authority's decision in the case at bar is not reasonably defensible. On the contrary, it is plain enough to us that its logic and outcome are entirely faithful to the statutory goals.

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We can find no error in this reasoning the Authority's construction of section 7106(a) . . . is thus fully obedient to the Congressional command that the Act be interpreted in a manner consistent with the exigencies of efficient government.

In reviewing the Authority's application of the Act to the facts of the case, we need only find that its action was neither arbitrary, capricious, abusive of discretion nor contrary to law. The Authority's holding clearly meets the test.

Within this past week we find:

- o This court concludes that the FLRA, in determining that the union's proposal falls without the parties' statutory duty to bargain, has properly performed its congressionally mandated role. . . . We find no support in either the statements or the case law for AFGE's argument that the FLRA may rule on the legality or validity of a government-wide OPM regulation.

and

- o The Authority's consistent division between language concerning application and language concerning content effectively disposes of the union's argument that the Authority's approach to this issue has been "irrational" and "without reasoned explanation. . . ."

But comparing the favorable comments of the courts to the unfavorable ones does little to establish anything other than both exist in the court decisions.

As of June 1, 1986, the Authority had closed more than 4,300 cases, with approximately 3,000 constituting substantive decisions by the Members. Of those, approximately 1,500 were subject to judicial review. There have been 370 cases before the courts actually involving the Authority and of those 297 had been closed as of June 1. Of those court cases involving review of FLRA decisions, the FLRA has been modified or set aside in only 66 cases. Even that figure is somewhat skewed and misleading because 24 of those cases involved the same issue. This was the question of whether employees who were serving as union negotiators and who were entitled to official time under § 7131(a), also had an entitlement to travel and per diem expenses. The FLRA had ruled in favor of the union (4 FLRA No. 40), the Ninth Circuit affirmed the FLRA's decision in BATF (672 F.2d 732) but the Supreme Court reversed the Ninth

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Circuit (464 U.S. 89). Consequently 23 other FLRA decisions on the same issue were reversed.

Actually for a relatively new agency which is still in its formative years in terms of the development of case precedent, especially judicial precedent, I believe the FLRA has done well when its decisions have been challenged. We only received the first substantive decision under the Statute in May 1981 from a court of appeals (652 F.2d 191).

I do not know how the FLRA's results in the court of appeals compare with the NLRB but I would draw some distinctions between the FLRA and the NLRB:

(1) Unlike the NLRB, the FLRA does not have the benefit of five decades of agency and judicial precedent to guide us. Many important questions of law have been decided and settled by the courts under the NLRA. The FLRA, on the other hand, is actively involved in resolving many pivotal issues for the first time under its Statute.

(2) While the determinations of both agencies are to be upheld if they are supported by substantial evidence on the record as a whole, are not arbitrary, capricious or an abuse of discretion and are otherwise in accordance with law, a larger percentage of unfair labor practice cases (e.g., 8(a)(1) and 8(a)(3) cases) at the NLRB are fact bound and are subject therefore to the "substantial evidence" test. In applying the substantial evidence test the degree of scrutiny by courts may not be as great so long as the record is complete. On the other hand, at the FLRA, a higher percentage of unfair labor practice cases have presented legal issues of first impression and are subject to the "contrary to law" standard. This is true to an even greater degree in negotiability cases which are unique to the FLRA where the issues are far more likely to be "legal" than evidentiary.

(3) A far higher percentage of FLRA cases (as compared with the NLRB) involve the interpretation of statutes other than its own. In a number of circuits the courts, in reviewing such FLRA cases, have exercised a higher degree of scrutiny than "normally due the Authority's construction of its enabling Statute" because "the [FLRA's] position rests, at least in part, on its interpretation of . . . a provision [of law], not with in the [FLRA's] enabling Statute."

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II. NTEU alleges (at p. 3 of its prepared statement) that "no fewer than three GAO reports have been issued dealing with the FLRA's performance. Each has severely criticized the Authority's inability to timely process its caseload."

RESPONSE:

I would hardly characterize the reports as severe criticism of the FLRA. Instead, the GAO reports were objective in the analysis of the FLRA's case processing problems.

The 1982 report (GAO/FPCD-83-5) said, for example (pp. 11-13):

These precedent decisions improve labor-mangement relations by reducing the need to file formal ULP charges or to further process ULP charges already filed. These benefits, however, have not been fully realized because precedent decisions have not been timely. Although progress is being made to improve the timeliness of decisions, problems could reoccur in the future. . . . Notwithstanding these efforts, budget reductions since FLRA's inception--coupled with increasing caseloads--have caused backlogs. Should these situations continue, untimely precedent case decisions may reoccur. [Emphasis added.]

The 1985 GAO report (GAO/GGD-86-29) said (pp. 4-5):

While the Authority can legally perform its statutory responsibilities with only two members, the absence of a third member has delayed decisionmaking on a number of ULP, representation, arbitration, and negotiability cases within the Authority. . . . During fiscal year 1985, the Authority closed 822 cases, the highest number in any fiscal year in the agency's history. However, of the 499 cases in the case tracking system as of August 22, 1985, 127 (25 percent) were in abeyance because of the lack of a third member.

In a subsequent 1986 report on "Federal Labor Relations Authority and Administrative Roles and Case Processing," (GAO/GGD-86-57, March 26, 1986), the GAO analyzed these reductions in both caseload and case backlog and stated:

The number of ULP cases closed by the Authority increased from 165 to 293 between FY 1983 and FY 1985.

.

Representation petitions before the Authority in FY 1985 took less than one-third as long to close as such petitions

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[did] in FY 1983. The Authority's representational caseload also declined significantly (from 141 to 55) as did the cases pending before the Authority (from 57 to 5) and the age of those pending cases.

The number of arbitration case closures has more than doubled between FY 1983 and FY 1985, with the highest number of such closures occurring in FY 1984. . . . By FY 1985, the number of arbitration cases pending decreased to less than one-third their FY 1983 level.

The number of negotiability appeals closed by the Authority increased from 141 to 198 between FY 1983 and FY 1985, with all of that increase attributable to merit closings.

I would hardly characterize these comments as severe criticism.

I would like to report that as of July 24, 1986, the FLRA has closed 74 cases for the month thereby reducing the case inventory to 422 cases--the lowest in 6 years.

III. NTEU alleged (at p. 11 of its prepared statement) that "McGuinnis [sic] revealed Frazier had even denied him access to agency budget information."

RESPONSE:

On May 24, 1985, Member McGinnis, General Counsel Miller and I held an FY '87 budget planning meeting with the staff. Member McGinnis, General Counsel Miller and I agreed "at that meeting that the agency would not submit a requested level above the current level and that at least two staffing/funding levels would be submitted--namely, the OMB policy level and a reduced level." (Please see the subsequent memorandum to John C. Miller, General Counsel, from Acting Chairman Frazier and William J. McGinnis, Jr., Subject: "FY 1987 Budget Submissions," July 12, 1985, a copy of which is attached and which will confirm Member McGinnis' involvement in the budget process.) The decisions made at that meeting were carried out by the staff and the FY '87 FLRA budget submission to OMB was developed on the basis of those decisions.

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However, at the OMB budget hearing on October 3, 1985, Member McGinnis announced that he did not support the FLRA's FY '87 budget submission which had been so developed. On October 9, 1985, he sent a letter with enclosures to OMB to support his thesis that the FLRA's "budget should be cut 10 percent each year for the next three years." He also advocated "a 20 percent reduction in staff."

On October 22, 1985, Member McGinnis went directly to the FLRA Comptroller's office without informing me and requested that the staff prepare new budget documents reflecting his proposed cuts. Contrary to the NTEU allegation, he did not simply request existing budget information. Instead, he assigned a significant work project to the Comptroller's office without informing, much less seeking the approval of, the Acting Chairman of the agency. Indeed, he had directed the staff not to inform the Acting Chairman of this assignment. By chance I learned of it.

In 1983 Congress enacted the Civil Service Miscellaneous Amendments Act. Senator Stevens, the bill's sponsor in the Senate said during Senate consideration of this bill:

Section 3 designates the chairman of the Federal Labor Relations Authority to be the chief executive officer of the Authority. This section is identical to S. 1664, ordered reported from the Governmental Affairs Committee on November 17, 1983. [It] would eliminate the ambiguity as to who has responsibility and authority for the management of internal administrative matters in the Authority.

This designation would insure that one individual is responsible and accountable for the sound management of the Authority. Accountability would be established for matters such as personnel management, fiscal management, general administrative support services, property management, procurement and contracts, and personnel property and document security, and management analysis and program evaluation. With the Chairman functioning as head of the Authority for the management of internal administrative matters, the agency would have a single individual to look to for leadership and direction. . . .

As the Chief Executive and Administrative Officer of the agency, with responsibility and accountability for the fiscal management of the agency, I directed the staff to inform Member McGinnis that if this project or any other work which the staff may be requested to perform involves matters pertaining to the Chairman's statutory authority as Chief Executive and Administrative Officer, the Acting Chairman requires that he be

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informed first of the assignment so that he can approve the necessity for its performance based on workload considerations and its relevance to agency mission, and upon its completion that the product be submitted to him for review before it is passed on to anyone either in writing or orally. The Comptroller so informed Member McGinnis in writing. Member McGinnis then relieved the staff of the assignment.

- IV. NTEU alleges (at p. 11 of its prepared statement) that "Member Frazier reported Member Applewaite [sic] to the FBI for an alleged illegal ex parte communication with a union president unconnected with the case. Yet, many forget that Member Frazier also had two ex parte conversations. . . . In neither case did Mr. Frazier report these incidents to the FBI."

RESPONSE:

At the hearings Senator Eagleton gave me permission to submit for the record additional information regarding the alleged ex parte contacts in the PATCO case. That information, which I submitted on July 23, should make it clear that I did not report Member Applewaite to the FBI for an alleged illegal ex parte communication. Instead, after consulting with private outside counsel, I concluded that I had a statutory responsibility to report to the proper authorities improper conduct by an individual outside the government which could amount to undue interference in or obstruction of the processes of the FLRA. Such interference or obstruction could constitute a violation of the U.S. Criminal Code. Consequently I authorized my attorney to inform the Department of Justice of what had been reported to me in this regard. The Criminal Division of DOJ and the FBI investigated the matter. The FBI did not investigate alleged ex parte contacts. The FBI was investigating a potential violation of the Criminal Code by the union president unconnected with the case. The jurisdiction of the FBI does not extend to alleged ex parte contacts at the FLRA. The FLRA administers the prohibitions against ex parte contacts in its rules. In my subsequent interview by agents of the FBI they did question me about the potential violation of the Criminal Code, i.e., undue interference in or obstruction of the processes of the FLRA because that is what they were investigating--not ex parte contacts. There was no attempt at undue interference or attempt to obstruct the processes of the FLRA in the two approaches which were made to me. Indeed, as I indicated in the material submitted on July 23, they did not even amount to prohibited ex parte communications because they fell within the exceptions in the FLRA rules.

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Subsequently, during the hearing ordered by the U.S. Court of Appeals for the D.C. Circuit "to determine the nature, extent, source and effect of any and all ex parte contacts or other approaches that may have been made to any Member or Members of the Authority," I voluntarily, fully and freely testified as to the nature of the contacts which two persons had with me. This is fully supported by the record in the case and the material which I submitted to the Committee on July 23.

- V. NTEU alleged (p. 4 of its prepared statement): "at the time of the first GAO report, of the 427 ULP's pending at the Authority, the median age was 288 days. In its most recent report, GAO found the median age of these cases had climbed to 655 days."

RESPONSE:

GAO's first report stated "as of March 31, 1982, 427 ULP cases were pending at some stage in processing before the Authority Members, and these cases had a median age of 288 days . . . calculated from the date that all filings related to the disposition of the case had been received." (p. 11) GAO's 1986 report found the following (p. 20):

C. Cases Pending at End of Fiscal Year, by Age

	[FY 1983]	[FY 1984]	[FY 1985]
1. 1-180 days	75	67	59
2. 180-360 days	59	54	36
3. 361-540 days	41	47	23
4. 541-720 days	39	39	14
5. 721+ days	60	73	16
6. Total	274	280	148

A simple calculation ($1/2$ of 148 = 74) reveals that the median age of pending ULP cases as of 30 September 1986 was in the 180-360 day range (not 655 days as NTEU alleged!) Furthermore, even this figure of 180-360 days does not reveal the full picture. GAO went on to say (p. 20) that the "age of cases . . . pending is determined from the date that the case is transmitted from the ALJ office to the Authority." The 1982 figure of 288 days was calculated from a date some time later, i.e., after all filings had been received by the FLRA from the parties. The period of time between the date the case is transmitted by the ALJ and the date the case is ready generally averages 60 days but may be longer if extensions of filing deadlines are requested by the parties. Therefore, if one adds 60 to 288, the comparable 1982 figure is 348 days.

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Furthermore, a simple calculation for FY '83 (1/2 of 274 = 137) and for FY '84 (1/2 of 280 = 140) reveals that the median age of pending ULP cases was somewhere in the 361-540 day range at the ends of those years. Therefore, by the end of FY 1985, when I had been Acting Chairman for 13 months, the median pending age of ULP cases had been reduced not increased as NTEU alleged!

The 655 day figure which NTEU alleged was the median age of pending ULP cases was instead the median age of closed ULP cases in FY 1985. As GAO explained it (p. 9):

The number of ULP cases closed by the Authority increased from 165 to 293 between FY 1983 and FY 1985, with most of that increase occurring during FY 1985. All of the increase is attributable to merit closings--those involving a formal decision by Members of the Authority based on the issues in the case. The median age of cases disposed of also increased, with all of that increase again a result of merit dispositions. According to the Director for Case Management, this increase in median age of cases closed is the result of a reduction in the backlog of older cases before the Authority. As more older cases were closed, the median age of case closures increased. (See table II. 3, p. 20.)

VI. NTEU states (p. 4 of its prepared statement) that "[i]n its report the GAO found 1/3 of these [negotiability] cases were over 721 days old."

RESPONSE:

NTEU failed to go on to quote the 1986 GAO report (p. 11) as to the cause: "The Director for Case Management said many of these older cases are cases in abeyance due to the lack of a third member." (I explained in my July 23 answer to Senator Glenn's third question the implications of the absence of a third Member in processing negotiability cases. Please see pp. 3-4 of my answer.)

VII. NTEU noted (at p. 5 of its prepared statement) that "[i]t is important to remember that GAO found a ULP can cost \$21,000 in 1982 dollars" and contended that "[A]t these prices someone needs to ask why after three GAO critical reports this is allowed to continue."

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RESPONSE:

GAO found in 1982 that "the cost of processing a meritorious ULP charge averages \$2,589 to \$21,276, depending on the processing stage at which it is resolved." GAO further found that the much smaller \$2,589 cost applied when there was a pre-complaint settlement of a meritorious charge. The only formal recommendation which GAO made to reduce costs (p. 15) was:

RECOMMENDATION

We recommend that FLRA require the parties involved in alleged ULPs to hold discussions to try to informally resolve issues before having a formal ULP charge investigated by FLRA.

In their written comments on the GAO report (p. 71) NTEU responded:

- II. Precharge Discussions of ULP's May Not Legally Be Required and Should Not Be Required for Policy Reasons.

Perhaps the most objectionable aspect of the report is the recommendation that FLRA order the parties to engage in precharge discussions. . . .

- VIII. NTEU alleges: "In 1986, GAO found that there were as many as 89 cases pending on the same issue; that is a waste of \$1,869,000."

RESPONSE:

First, GAO did not find "as many as 89 cases pending on the same issue." The GAO found and I quote from the 1985 report (p. 6):

- o In 45 cases (43 negotiability appeals and 2 ULP cases), the issues related to the nature and extent of the employer's obligation to bargain over proposals concerning employees adversely affected by the exercise of management rights.
- o In 39 cases (22 negotiability appeals, 8 exceptions to arbitration awards, and 9 ULP cases) the issues concerned whether and to what extent a labor organization may bargain over matters relating to expenditures of funds for bargaining.

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- o In 5 exceptions to arbitration awards, the issues involved the standards to govern the review of awards issued by grievance arbitrators in cases resulting from challenges to procurement awards.

The GAO went on to note that "[f]or some of the issues central to the 89 cases, the Authority has been attempting since June 1985, to identify a representative or "lead" case to adjudicate. Once lead cases have been identified and resolved, the Director for Case Management said the remaining cases will be sent to the Members for resolution."

(As I noted in my July 23 answers to Senator Glenn's first question and to Senator Gore's question on "excessive interference," Chairman Calhoun and I have issued "lead" decisions on the first two issues. We have also issued many of the remaining cases on the same issues. On July 23, 1986, we issued the "lead" case on the third issue.)

Second, the waste of \$1,869,000 which NTEU alleges is somewhat disingenuous. GAO found in its 1982 report (p. 6) "the cost of processing a meritorious ULP charge averages \$2,589 to \$21,276, depending on the processing stage at which it is resolved." The \$21,276 figure represents ULP cases which are processed through an ALJ hearing and to the FLRA Members and staff for decision. The \$21,276 includes costs to the Government agency involved as a party to the case of \$7,257. The GAO said that these "agency processing costs include management and union time and travel expenses for case investigation, preparation and presentation at hearing as appropriate."

Only 11 of the "89" cases described in the 1985 report were ULP cases. The remainder were negotiability cases (65) and exceptions to arbitration awards (13). Neither negotiability cases nor exceptions to arbitration awards were costed in the 1982 GAO report. However, it should be noted that neither type of case involves: (1) the Office of the General Counsel (costs of \$2,227 in a ULP case); (2) a hearing before an ALJ (costs of \$3,754 in a ULP case); or (3) agency processing costs relating to investigation, preparation and presentation at a hearing (some part of \$7,257 costs in a ULP case). Therefore, it is not accurate to use the costs of processing a ULP case to estimate the costs of processing a negotiability case or exceptions to an arbitration award which would cost considerably less.

Attachment
(Attachment to Question III.)

ATTACHMENT TO III.



UNITED STATES OF AMERICA
FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C. 20341

July 12, 1985

OFFICE OF THE CHAIRMAN

MEMORANDUM

TO: John C. Miller
General Counsel

FROM: Henry B. Frazier III, Acting Chairman
William J. McGinnis, Jr., Member

SUBJECT: FY 1987 Budget Submissions

The Comptroller has informed us that he has received your submission in response to the call for estimates which we discussed in our FY 1987 budget planning meeting on May 24. As you will recall, we decided at that meeting that the agency would not submit a requested level above the current level and that at least two staffing/funding levels would be submitted--namely, the OMB policy level and a reduced level. However, the Comptroller informs us that you failed to include a reduced level budget with your submission.

Our decision on May 24 was in furtherance of the President's policy to reduce Federal domestic spending. In his FY 1986 Budget Message to the Congress the President said:

The profusion of Federal domestic spending programs must be reduced to an acceptable, appropriate, and supportable size.

Not only must both the scope and scale of Federal spending be drastically cut back to reduce the deficit; We must also institute comprehensive management improvements and administrative reforms to make sure that we use available funds as efficiently as possible.

In his Planning Allowance Letter of February 14, 1985 to the Acting Chairman of the Authority, the Director of OMB noted "the President's resolve to limit the size and scope of the Government and . . . for a measured but steady decline in the size of the budget deficit."

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Finally, OMB Circular A-11, "Preparation and Submission of Budget Estimates" Section 24.2 Justification of programs and financing provides:

A justification, prepared in concise, specific terms and covering all programs and activities, will be required for each decision unit. . . . In addition, agencies will identify and discuss the implications of several alternative funding levels for each decision unit

.

For each decision unit, agencies will identify and discuss the implications of the following three funding options, unless alternative levels have been agreed to by the OMB representatives responsible for review of the Agency's budget submission:

- the agency request, which should be consistent with assigned planning ceilings;
- current policy, if different from the agency request; and
- a level that falls below both the agency request and current policy.

You are requested to submit a reduced level budget proposal for your Decision Unit FY 1987 by close of business on Monday, July 15, 1985. It is essential that this estimate be prepared so that we can stay on schedule in completing this phase of the FY 1987 budget cycle. The Comptroller and his staff are available to assist you in this effort.

If you are unable to comply with this request, we have directed the Comptroller to prepare a reduced level budget for the agency which would reflect reductions for the General Counsel Decision Unit comparable to those in the other Decision Units in the agency.

PREPARED STATEMENT OF JEAN MCKEE

Mr. Chairman and Members of the Committee: It is an honor and a pleasure to appear before this Committee as a nominee for Member of the Federal Labor Relations Authority. Twice before the Senate has approved my nomination upon submission by a President of the United States, and I am deeply appreciative of the opportunities which I have been given to serve in those capacities in the past.

As the biographical information which I filed in prenomination papers shows, I have experience working as chief administrative officer for two agencies, on the oversight Advisory Commission for the United States Information Agency and on management task forces for several agencies. In addition, I have experience working for a neutral labor relations agency, the Federal Mediation and Conciliation Service and for the late Senator Jacob K. Javits while he served on the Labor and Public Welfare (now Labor and Human Resources) Committee on which he was Ranking Minority Member and the Government Operations (now Governmental Affairs) Committee.

My family has a long history of public service in a variety of capacities. It begins with my ancestor who was a Delegate to the Connecticut Convention which voted approval of our United States Constitution and includes a Member of Congress from the State of New York.

I am proud to have continued that tradition and am especially aware of the Senate's role in approving nominations. As a former Senate staff member, I am also mindful of your interest and concern in an oversight capacity.

Please be assured that I am available at any time to answer your questions, that I intend to perform my duties in a fair and conscientious manner, and will dedicate my efforts to making a contribution to the successful operation of the Federal Labor Relations Authority.

BIOGRAPHICAL AND FINANCIAL INFORMATION REQUESTED OF NOMINEES

A. BIOGRAPHICAL INFORMATION

1. Name: (Include any former names used.)

Margaret Jean McKee (Margaret does not appear on birth certificate, but does on christening records at St. Peter's Church, Main St., Cheshire, CT. 06410)

2. Position to which nominated:

Member, Federal Labor Relations Authority

3. Date of Nomination:

April 8, 1986

4. Address: (List current place of residence and office addresses.)

Res.: 3001 Veazey Terrace, N.W.
Washington, D. C. 20008

Off.: 2100 K Street, N.W.
Washington, D. C. 20427

5. Date and Place of birth:

June 20, 1929; New Haven, CT.

6. Marital status: (Include maiden name of wife or husband's name.)

Single

7. Names and ages of children:

Not applicable

8. Education: List secondary and higher education institutions, dates attended, degree received and date degree granted.

Packer Collegiate Institute - 1933-47
170 Joralemon St., Brooklyn, N.Y.

Vassar College - 1947-51, B.A. 1951
Poughkeepsie, N.Y.

New York University - 1978
Division of Career & Professional Development
New York, N.Y.

University of Southern California - 1979 (Certificate)
Graduate School of Business
Winter Executive Program
Los Angeles, California

American University - 1982
Washington, D. C.

9. Employment Record: List all jobs held since college, including the title or description of job, name of employer, location of work, and dates of employment.

3/83-date, Executive Director, Federal Mediation & Conciliation Service, 2100 K St., N.W., Washington, D.C.

11/80-2/83, Director of Government Relations, General Mills Restaurant Group, Inc., 1200 New Hampshire Ave., N.W., Washington, D.C.

3/80-11/80, Public Affairs Consultant, 785 Park Avenue, New York, N.Y.

1/80-3/80, Pre-Campaign direction, John L. Loeb, Jr., White Plains, New York, and 375 Park Avenue, New York, N.Y.

1/79-1/80, Public Affairs Consultant, 785 Park Avenue, New York, N.Y., and 532 South Brooksvale Road, Cheshire, CT.

9/78-1/79, Chief of Staff, Minority Leader, New York State Assembly, 270 Broadway, New York, N.Y.

6/78-9/78, Operations Director, Duryea for Governor, 8 West 40th St., and 30 E. 42nd St., New York, N.Y.

2/78-6/78, Chief of Staff, Minority Leader, New York State Assembly, 270 Broadway, New York, N.Y.

3/76-6/77, Deputy Administrator & Acting Administrator, American Revolution Bicentennial Administration, 2401 E St., N.W., Washington, D.C.

11/72-9/75, Administrative Assistant, Office of Senator Jacob K. Javits, Russell Senate Office Building, Washington, D.C.

8/72-11/72, Director of Scheduling & Speakers, New York Committee to Re-Elect the President, Hotel Roosevelt, Madison Avenue & 45th St., New York, N.Y.

11/70-10/72, Special Assistant, Office of Senator Jacob K. Javits, 326 Old Senate Office Building, Washington, D.C.

9/70-11/70, Director of Scheduling, Goodell for Senate Campaign Committee, 575 Madison Avenue, New York, N.Y.

2/69-8/70, Special Assistant, Office of Senator Jacob K. Javits, 320 Old Senate Office Building, Washington, D.C.

11/68-2/69, Special Assistant, Office of Senator Jacob K. Javits, 110 East 45th St., New York, N.Y.

5/68-11/68, Deputy Campaign Manager, Javits for Senator Campaign Committee, Hotel Roosevelt, 45th St. & Madison Avenue, New York, N.Y.

3/67-11/68, Special Assistant, Office of Senator Jacob K. Javits, 110 East 45th St., New York, N.Y.

6/66-11/66, Director of Scheduling, Republican State Campaign Committee, New York Hilton, Avenue of Americas at 53rd St., New York, N.Y.

2/66-6/66, Director of Scheduling, New York Republic State Committee, 120 E. 56th St., New York, N.Y. - Office located at 22 West 55th St., New York, N.Y.

11/65-2/66, Partner & Treasurer, Consensus, Inc., 30 E. 42nd St., New York, N.Y.

9/65-11/65, Assistant Campaign Manager, Kenneth B. Keating for Judge of the Court of Appeals (NY State), Hotel Biltmore, 43rd St. & Madison Ave., New York, N.Y.

11/64-9/65, Partner & Treasurer, Consensus, Inc., 30 E. 42nd St., New York, N.Y.

8/64-11/64, Co-Director, New York State Republican Campaign Committee, 521 Fifth Avenue, New York, N.Y.

2/64-7/64, Co-Chairman, Special Assistants, Rockefeller National Campaign Committee, 521 Fifth Avenue, New York, N.Y.

1/62-2/64, Partner & Treasurer, Consensus, Inc., 44 E. 80th St., New York, N.Y.

10/61-11/61, Special Assistant, Republican City Campaign Committee, Hotel Commodore, Lexington Ave. & 42nd St., New York, N.Y.

10/61-10/61, Special Assistant, Finance Committee for Lefkowitz, Rockefeller Center, New York, N.Y.

7/61-10/61, Special Assistant, United Citizens for Lefkowitz (for Mayor), Belmont-Plaza Hotel, Lexington Ave. at 49th St., New York, N.Y.

2/61-3/61, Assistant to political columnist Raymond Moley, Newsweek Magazine, 444 Madison Avenue, New York, N.Y.

9/60-12/60, Executive Secretary, New York State Independent Citizens for Nixon-Lodge, 277 Park Ave., New York, N.Y.

11/59-8/60, Executive Secretary, New Yorkers for Nixon, 555 Madison Ave., New York, N.Y.

11/57-11/59, Researcher, Stricker & Henning Research Associates, 24 West 58th St., New York, N. Y.

9/55-11/57, Staff Assistant, Crusade for Freedom. 345 East 45th St., New York, N.Y.

2/53-9/55, Staff Assistant, New York Republican State Committee, 41 East 42nd St., New York, N.Y.

4/52-11/52, Staff Assistant, United Republican Finance Committee, 270 Park Avenue, New York, N.Y.

10. Government Experience: List any advisory, consultative, honorary or other part-time service or positions with Federal, State, or local governments, other than those listed above.

1986, Member, Clerical Recruitment Task Force, United States Information Agency

1985, Member, Management Review Task Force, Consumer Product Safety Commission

1982-date, Member, Private Sector Public Relations Advisory Committee, United States Information Agency

7/79-7/82, Commissioner, Advisory Commission on Public Diplomacy, 400 C St., N.W., Washington, D.C.

5/65-5/72, Commissioner, New York State Bingo Control Commission, 162 Washington Ave., Albany, N.Y.

11. Business Relationships: List all positions held as an officer, director, trustee, partner, proprietor, agent, representative, or consultant of any corporation, company, firm, partnership, or other business enterprise, educational or other institution.

12/79-date, Member of Board of Directors, Intramerica Life Insurance Company, P.O. Box 1722, 1 Blue Hills Plaza, Pearl River, N.Y.

12. Memberships: List all memberships and offices held in professional, fraternal, scholarly, civic, business, charitable and other organizations.

Washington, D. C. Vassar Club - 1969-to date

Brooklyn Orphan Asylum Junior Committee - 1951-c.1958, Board Member

Heights Casino, Brooklyn, N.Y. - 1951-c.1959

Junior League of Brooklyn - 1952-c.68, Board Member

Brooklyn Home for Children - 1953-c.1957, Junior Board

Friends of Central & Prospect Park, Brooklyn, NY - c.1960-1980

National Trust for Historic Preservation and Historic House Association- 1970's-c.1982 & 1985-to date

Smithsonian Institution - c.1969-1984

Executive Women in Government - 1975-to date, Vice Chairman, Chairman

National Women's Education Fund - 1975-1982, Board Member
 Friends of Kennedy Center - c.1970-to date
 National Archives - c.1975-1980
 Forest Hills Citizens Association, Inc. - c.1970-1980
 American Automobile Association - c.1972-to date
 American News Women's Club - 1976-to date
 Society of Descendents of Colonial Clergy - 1976-c.1980
 National Society of Colonial Dames in the State of New York
 Sons & Daughters of the Pilgrims - 1976-to date
 National Association of Female Executives - 1978-1980
 Heights-Slope Young Republican Club - 1955-c.1965
 New York Young Women's Republican Club - 1953-c.1967
 National Women's Republican Club - 1953-c.1965
 Capitol Hill Women's Republican Club. c.1971-77
 Republican Women's Federal Forum - c.1975-83
 D.C. League of Republican Women - 1983-date
 Women in Government Relations - 1981-1983
 Small Agency Council - 1984-to date, Executive Committee
 AMIG Steering Committee of the Administrative Conference of
 the U. S. - 1984-to date

13. Political Affiliations and Activities:

- (a) List all offices with a political party which you held or any public office for which you have been a candidate.

Following were all New York:

Young Republicans: Pres., Heights-Slope Y.R. Club, 1955-56; Board Member, Young Women's Republican Club of N.Y., various years 1953-66.
 State Young Republican Association: Vice Chairman 1955-57, Chairman 1957-58, 2nd Judicial District; Vice Chairman Board of Governors 1958-60; Vice President 1960-62, President 1962-64.
 Federation of Women's Republican Clubs: Executive Committee Member 1960-64; Council Member 1964-70.
 Republican State Committee: Executive Committee Member, 1962-64.
 Alternate Delegate-at-Large, 1964 Republican National Convention.
 Committee to Fill Vacancies, 1966 Gubernatorial election.
 National Young Republicans: Secretary, Mid-Atlantic Council c.1954; Committee Vice Chairman c.1961-63.

- (b) List all memberships and offices held in and services rendered to all political parties or election committees during the last 10 years.

1982 Fundraising for Congressional candidates: Orran Hatch, Hamilton Fish, Frank Horton, Sherwood Boehlert
 1980 Director of Planning, Strategy and Women's Programs, Connecticut Reagan-Bush Campaign
 1978 Duryea for Governor (see #9 above)

Note: All others for (a) and (b) listed in #9 above

- (c) Itemize all political contributions to any individual, campaign organization, political party, political action committee, or similar entity of \$50 or more for the past 10 years.

1985: Committee to Re-Elect Joy Hostage, \$50
 New York Republican State Committee, \$100
 1984: Committee for Roy Goodman, \$100
 Committee to Re-Elect Bill Green, \$100
 New York Republican State Committee, \$100
 1982: Friends of Sherwood Boehlert, \$150
 Catherine Bertini for Congress, \$50
 Bruce Chapman for Governor, \$50
 1978: Assembly Campaign Committee (NY), \$50
 John Warner for Senate, \$50
 Committee for Goodman, \$50
 N. Y. Republican State Committee Dinner, \$150
 Duryea for Governor, \$125

14. Honors and Awards: List all scholarships, fellowships, honorary society memberships, military medals and any other special recognitions for outstanding service or achievements.

None

15. Published Writings: List the titles, publishers, and date of books, articles, reports, or other published materials which you have written.

Article: "...And Yet So Far: Today's Cuba", The Institute for Socioeconomic Studies, White Plains, N.Y., Summer 1980

16. Speeches: Provide the Committee with two copies of any formal speeches you have delivered during the last 5 years which you have copies of and are on topics relevant to the position for which you have been nominated.

None

17. Selection:

- (a) Do you know why you were chosen for this nomination by the President?

Having served effectively for three years in his administration, I have been offered the opportunity for a promotion.

- (b) What do you believe in your background or employment experience affirmatively qualifies you for this particular appointment?

Over the years, I have gained the reputation of making fair and reasonable decisions. I believe in determining issues based on the facts, on hearing both sides of an issue before making decisions, and being precise as to the reasoning behind such decisions, whether verbal or written.

There are two other attributes which I would bring to this position: familiarity with labor-management relations and the administration of government.

As Executive Director of the Federal Mediation and Conciliation Service for the past three years, I have been involved with the broad area of labor-management relations. FMCS handles both private and public sector mediation and I am familiar with each area. As one of my responsibilities, I have chaired the labor-management committee that resolves any problems between the management of the agency and its union. In addition, our National Office has been actively engaged in mediation in the federal sector in a variety of instances.

Throughout my career I often have been involved with labor-management issues. During 1977, I attended and participated in a number of meetings in which the proposed Civil Service Reform Act was discussed. As personnel was part of my responsibilities as both Deputy and Acting Administrator of the American Revolution Bicentennial Administration, I was interested and concerned with the proposed restructuring. I also was interested as the representative of the National Women's Education Fund on the Coalition for Women Appointments, a coalition of some 34 women's organizations furthering appointments of women, most especially at the policy levels of government.

During the years I worked with Senator Jacob K. Javits, he was the Ranking Minority on the then Labor and Public Welfare Committee. As both Special Assistant and Administrative Assistant, I was necessarily cognizant of the broad spectrum of labor issues on which his labor specialist worked. In addition, the staff person who handled case work on civil service and union problems worked closely with me in my responsibilities for non-career appointments. Later, as Director of Government Relations for the General Mills Restaurant Group, labor issues were also an area I followed.

In addition to my familiarity with labor-management relations, I have a strong background in administration of government. This derives not only from my experience at the Bicentennial and FMCS, but from my work on the Advisory Commission on Public Diplomacy with oversight on the United States Information Agency. From an educational standpoint, I attended the University of Southern California Graduate School of Business Winter Executive Program. My expertise was sought recently by the Consumer Product Safety Commission when reviewing its management structures.

As a Commissioner on the New York State Bingo Control Commission, I was involved not only with the management of the agency, but with the hearing and deciding of cases before the Commission. We had oversight on some 2,000 weekly Bingo games which raised over \$140 million yearly for charitable organizations. The hearings covered a wide range of alleged infractions - from embezzlements of \$50,000 to the unionization of guard services.

This is the second time an opportunity has arisen to serve in this kind of position. In 1976 the White House Personnel Office had indicated it wanted to submit my name for Member of the Civil Service Commission. However, I declined that opportunity as I had already accepted the position as Deputy Administrator of the American Revolution Bicentennial Administration, a unique experience available only once in a lifetime. I am pleased that I have been offered this new opportunity to serve in a similar capacity.

B. FUTURE EMPLOYMENT RELATIONSHIPS

1. Will you sever all connections with your present employers, business firms, business associations or business organizations if you are confirmed by the Senate?

Yes

2. Do you have any plans, commitments or agreements to pursue outside employment, with or without compensation, during your service with the government?

No

3. Do you have any plans, commitments or agreements after completing government service to resume employment, affiliation or practice with your previous employer, business firm, association or organization?

No

4. Has anybody made a commitment to employ your services in any capacity after you leave government service?

No

5. If confirmed, do you expect to serve out your full term or until the next Presidential election, whichever is applicable?

Yes

C. POTENTIAL CONFLICTS OF INTEREST

1. Describe all financial arrangements, deferred compensation agreements, and other continuing dealings with business associates, clients or customers.

None

2. Indicate any investments, obligations, liabilities, or other relationships which could involve potential conflicts of interest in the position to which you have been nominated.

None

3. Describe any business relationship, dealing or financial transaction which you have had during the last 10 years, whether for yourself, on behalf of a client, or acting as an agent, that could in any way constitute or result in a possible conflict of interest in the position to which you have been nominated.

None to the best of my knowledge

4. Describe any activity during the past 10 years in which you have engaged for the purpose of directly or indirectly influencing the passage, defeat or modification of any legislation or affecting the administration and execution of law or public policy.

During 1976-77, as Acting Administrator of the American Revolution Bicentennial Administration, testified before House Subcommittee on Interior of Appropriations Committee on behalf of enhancing the Constitutional Gardens.

During 1980-83 as Director of Government Relations for the General Mills Restaurant Group, I lobbied on a variety of issues before the Congress and being considered by the Executive branch. I met with federal officials on regulations affecting business. I also cooperated with several trade associations on public issues, most particularly the National Restaurant Association, the Food Service and Lodging Institute, the National Fisheries Institute and the Chamber of Commerce. The broad issues of concern were food, particularly fish, wages, youth differential, Targeted Jobs Tax Credits, taxes on tips, Caribbean Basin Initiative, and the Immigration bill. To the best of my recollection, there were no issues involving federal labor-management relations.

1983 to date, at the Federal Mediation and Conciliation Service, I have contributed to preparation of the budget, conferred on legislation referred by the House or Senate Committees, and any revisions of the regulations under which the Arbitrator Review Board operates.

5. Explain how you will resolve any potential conflict of interest, including any that may be disclosed by your responses to the above items. (Please provide a copy of any trust or other agreements.)

Resign as Member, Board of Directors, Intramerica Life Insurance Company as no outside relationships permitted in this position

6. Do you agree to have written opinions provided to the Committee by the General Counsel of the agency to which you are nominated and by the Attorney General's office concerning potential conflicts of interest or any legal impediments to your serving in this position?

Yes

D. LEGAL MATTERS

1. Have you ever been disciplined or cited for a breach of ethics for unprofessional conduct by, or been the subject of a complaint to any court, administrative agency, professional association, disciplinary committee, or other professional group? If so, provide details.

No

2. Have you ever been investigated, arrested, charged or held by any Federal, State, or other law enforcement authority for violation of any Federal, State, county or municipal law, regulation or ordinance, other than a minor traffic offense? If so, give details.

No

3. Have you or any business of which you are or were an officer ever been involved as a party in interest in any administrative agency proceeding or civil litigation? If so, provide details.

No

4. Have you ever been convicted (including pleas of guilty or nolo contendere) of any criminal violation other than a minor traffic offense?

No

5. Please advise the Committee of any additional information, favorable or unfavorable, which you feel should be considered in connection with your nomination.

None to my knowledge

PREHEARING QUESTIONS FOR JEAN MCKEE

I. NOMINATION PROCESS AND POTENTIAL CONFLICTS

Question 1. Is there any issue currently under consideration by the Federal Labor Relations Authority from which you may have to disqualify yourself? If so, please explain.

None to my knowledge. However, if any case arose in which there was a conflict of interest, I would take appropriate action to avoid the conflict.

Question 2. How were you selected to be nominated to serve as a Member of the Federal Labor Relations Authority? Were any conditions, expressed or implied, attached to your nomination?

The White House Personnel Office inquired if I would be available for consideration for this position. Subsequently I was interviewed and the nomination proceeded along normal channels. No conditions were attached to the nomination.

Question 3. Have you made any specific commitments with respect to the basic policies and philosophy you will seek to implement as a Member of the FLRA? If so, please describe these commitments.

No

Question 4. Why did you take this appointment to be a Member of the Federal Labor Relations Authority?

It provides an opportunity to contribute in a substantive position which continues to augment my involvement in labor-management relations in the Federal sector.

Question 5. Why do you feel that you are particularly well qualified to serve in this position?

Over the years, I have gained the reputation of making fair and reasonable decisions. I believe in determining issues based on the facts, on hearing both sides of an issue before making decisions, and being precise as to the reasoning behind such decisions, whether verbal or written.

There are two other attributes which I would bring to this position: familiarity with labor-management relations and the administration of government.

As Executive Director of the Federal Mediation and Conciliation Service for the past three years, I have been involved with the broad area of labor-management relations. FMCS handles both private and public sector mediation, and I am familiar with each area. As one of my responsibilities, I have chaired the labor-management committee that resolves any problems between the management of the agency and the union. In addition, our National Office has been actively engaged in mediation in the federal sector in a variety of instances.

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During the years I worked with Senator Jacob K. Javits, he was the Ranking Minority on the then Labor and Public Welfare Committee. As both Special Assistant and Administrative Assistant, I was necessarily cognizant of the broad spectrum of labor issues on which his labor specialist worked. In addition, the staff person who handled case work on civil service and union problems worked closely with me in my responsibilities for non-career appointments. Later, as Director of Government Relations for the General Mills Restaurant Group, labor issues were also an area I followed.

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II. THE FEDERAL LABOR RELATIONS AUTHORITY

Question 1. What do you believe to be the role and responsibilities of the Federal Labor Relations Authority?

I believe the most important obligation is the overall responsibility as stated in the law: to "...provide leadership in establishing policies and guidance..." for the Federal sector. I think it is this leadership responsibility which has to be reflected in the choices and decisions made by the Authority.

The major role and responsibilities of the Members of the Authority are to expeditiously make fair and reasoned decisions based on the facts presented keeping in mind prior precedents and their possible application.

Question 2. What do you believe are the FLRA's most important functions?

- * Deciding unfair labor practice issues. These include refusal to bargain, unlawful interference, restraint and coercion by one side against the other, and pro-union or anti-union discrimination.
- * Deciding representation issues, including appropriate unit determinations.
- * Determining whether matters are negotiable, or negotiable only at the option of an agency, or not negotiable at all.
- * Prescribing criteria and resolving issues concerning national consultation rights.
- * Reviewing the decisions of arbitrators who have made awards in grievance cases under collective bargaining contracts and in interest arbitration cases.

This is by no means an exhaustive list, rather it outlines what I perceive to be the major functions that require most of the Authority's time and effort.

Question 3. What do you feel are the most important functions of the position to which you have been nominated?

I believe what is most important is my contribution to the overall responsibility of insuring the authority performs in an outstanding manner the role it has been assigned in Federal labor-management relations. Also most important will be my ability to render clear decisions which have been arrived at fairly and in a timely manner.

Question 4. How do you see the relationship between the FLRA and (a) the Office of Personnel Management and (b) the Merit Systems Protection Board?

The Office of Personnel Management, the Merit System Protection Board and the Federal Labor Relations Authority each have relatively distinct roles in the Federal government's dealings with personnel. The cumulative effect is to set the regulations and parameters under which personnel practices are pursued and to protect the rights of the workers.

Overall, the Office of Personnel Management serves as the Government's chief personnel manager - responsible for such matters as entrance examinations, classification, and retirement. It issues advice and guidance to Federal agencies in regard to labor relations matters. It also maintains a central file on the terms and conditions that have been agreed to in various collective bargaining contracts that have been signed by agencies. In the labor-relations area, it also performs research and distributes information. It is authorized to run demonstration projects concerning matters such as pay or promotion policy.

The primary mission of the Merit System Protection Board is to administer the law concerning prohibited personnel practices. This includes adverse actions for misconduct, actions based on unsatisfactory work performance and reprisals for whistleblowing. The MSPB also is authorized to review regulations issued by OPN to insure that they will not lead to the commission of a prohibited personnel action.

There is some overlap between MSPB and FLRA cases because a Federal employee can challenge an agency disciplinary action by appealing to the MSPB or taking the matter to arbitration under a collective bargaining contract. To the extent that FLRA and MSPB problems may arise, they may have to be resolved on a case by case basis (e.g. *Cornelius v. Nutt*, 108 S. Ct. 2882 (1985).)

Question 5. Do you believe that any changes in the functions and authority of the FLRA, OPM, or MSPB are warranted?

It would seem inappropriate to comment on such a matter as I have not been involved directly in the responsibilities of the FLRA, nor, for that matter the other two agencies, up to the present time.

Question 6. How do you plan to ensure consistency between the decisions of the FLRA and the decisions of the MSPB in any cases which involve both, such as allegations of unfair labor practices or discrimination?

I think careful attention will have to be paid to the positions taken by the MSPB and an effort will have to be made to harmonize decisions made on a case by case basis. If a conflict cannot be averted, then a resolution will have to come by means of Federal Court decisions.

Question 7. Do you feel that labor-management relations in the Federal government should resemble as closely as possible the practices and precedents in the private sector. Are there important differences in the two?

While there are some applicable practices and procedures, there are very important differences. The private sector system is based on the use of economic power as the final arbiter of collective bargaining disputes. If an agreement cannot be reached the parties resort to the strike or lockout.

In the Federal sector, economic warfare is not permitted. The PATCO strike is the clearest example of that principle. Instead, mediation and arbitration are the procedures employed to bring bargaining disputes to an end. Mediation is performed by the Federal Mediation and Conciliation Service and arbitrations by the Federal Service Impasses Panel of the FLRA.

Also, in the Federal sector there is an overlay of rules, regulations and laws which must be adhered to. This makes the Federal labor relations program more complex than other programs. This complexity cannot be avoided because the program is not dealing with private employers, but rather with instruments of government that operate by mandate of law and regulation.

Therefore, what is required is recognition of the fundamental concept of service to the public and a balancing of that concept with the principles of collective bargaining.

Question 8. Do you have any recommendations to facilitate case processing at the FLRA?

While I am aware of the need to facilitate case processing at the FLRA, I have no specific suggestions at this time as I have not had "hands on" experience. I do believe that effective management is an important ingredient in making the process work.

Question 9. The law established the General Counsel position at the Federal Labor Relations Authority to investigate and prosecute complaints. Since the Authority was established, differences of opinion have existed as to the proper degree of independence for the General Counsel from the Authority. What is your view as to the amount of independence needed by the General Counsel to adequately perform the prosecutorial role? What do you believe the Authority should do to resolve this debate and promote a harmonious working relationship?

As far as I understand this matter at the present time, it is a question of the General Counsel's budget authority. As the positions of the persons involved have not been presented to me, and I am not familiar with the arguments that have been made, I do not think it is appropriate for me to comment. Of course, the independent prosecutorial role of the General Counsel should not be challenged either in unfair labor practice matters or in those representation matters which have been delegated by the Authority.

III. THE CIVIL SERVICE REFORM ACT

Question 1. What do you feel are the most important principles of the Civil Service Reform Act?

The Act is, of course, very broad in scope. It created the Merit Pay System and the Senior Executive Service. It established the three major agencies that have been mentioned: the Merit System Protection Board, the Office of Personnel Management and the Federal Labor Relations Authority. These were far reaching changes.

In trying to abstract the most important principles, I would cite merit, non-discrimination, basic fairness, and protection of the employee.

Question 2. Do you feel that the Civil Service Reform Act offers too much, too little, or the appropriate amount of protection for the Federal employee?

This question involves the province of the MSPB and OPM as well as the FLRA. Therefore, I can address it only in general terms. On the whole, I believe that the statute attempts a fair balancing of the various equities given the magnitude of its application. No doubt, some adjustments will have to be made as the program evolves to adjust to perceived needs and to accommodate to new circumstances.

Question 3. Do you feel that any particular changes in the Act would be helpful toward carrying out the goals of the legislation?

Without the direct experience of working daily with the portion of the Act that deals with labor-relations, I believe it would be inappropriate to comment.

IV. RELATIONS WITH CONGRESS

Question 1. Do you agree without reservation to respond to any reasonable summons to appear and testify before any duly constituted committee of the Congress if you are confirmed?

Yes

Question 2. Are you willing to provide such information as is requested by such committees?

Yes

AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES

Affiliated with AFL-CIO
80 F Street, N.W., Washington, D.C. 20001



STATEMENT BY

**KENNETH T. BLAYLOCK
NATIONAL PRESIDENT
AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES
(AFL-CIO)**

BEFORE THE

**COMMITTEE ON GOVERNMENTAL AFFAIRS
UNITED STATES SENATE**

REGARDING

**THE RENOMINATION OF HENRY B. FRAZIER
TO THE FEDERAL LABOR RELATIONS AUTHORITY**

ON

JULY 16, 1986

I am National President of the American Federation of Government Employees and am proud to represent 700,000 organized Federal and District of Columbia employees. We come before this Committee to testify on the poor performance of Henry B. Frazier and to oppose his reappointment to the Federal Labor Relations Authority.

In 1978, Congress enacted the Civil Service Reform Act to improve the efficiency of the federal service in various ways, including improving labor relations in the Federal sector. The Act recognizes that the right of employees to organize and collectively bargain is in the public interest. It also includes performance appraisal provisions that require removal of employees who do not or cannot perform the "critical elements" of their positions. Appointed employees such as Mr. Frazier are subject to different procedures than are competitive service employees, but the law doesn't exclude Mr. Frazier from the government's demand that all employees perform competently. This hearing is the one opportunity to put that performance into the sunshine so the American public and the federal worker can see how Mr. Frazier has done.

The record shows that he has failed in every significant aspect (every "critical element" in the language of the law) of his job as a Member and Acting Chairman of the Federal Labor Relations Authority.

Before addressing that record, I want to mention the historical framework of labor-management relations in the federal government. The FLRA's predecessor, the Federal Labor Relations Council, derived its authority from Executive Order 11491, and consequently was limited in its ability to administer a program affected by numerous laws, rules, regulations, and existing union-management relationships. Mr. Frazier was the Executive Director of the FLRC. Upon passage of the Act in 1978, we did not oppose Mr. Frazier's appointment to the newly-created FLRA. We took him at his word that, with the authority of the new law to work with, he would be able to improve the labor-management program and federal service as Congress mandated. We wanted to help the CSRA get off the ground so it could implement and administer improvements we had urged Congress to enact - binding arbitration, dues check-off, and enforcement of such improvements as a matter of law.

Unfortunately, the past 7 years have shown that Mr. Frazier's FLRA has not utilized the CSRA as it was designed to be utilized - even though as the FLRC's Executive Director he was in the best position to accomplish Congress' goals. Instead, Mr. Frazier brought over from the FLRC the same administrative inefficiency that plagued case processing there, and if anything, has established a record for the FLRA that makes the Executive Order system look good by comparison. The FLRA had the opportunity to administer federal labor-management programs with

leadership, efficiency, and improved performance. Mr. Frazier - alone among the handful of Members in the FLRA's brief history - has been on the FLRA from its inception. He is the single person most responsible for its performance, even serving for 16 months as Acting Chairman and is in the labor relations program's professional in-house bureaucrat.

Turning to the FLRA's record, I emphasize that it is not just AFGE and not just federal sector unions who are critical of it. The federal courts have repeatedly found fault with Mr. Frazier's FLRA for reasons as varied as its failure to adjudicate disputes within any reasonable period and its failure to provide reasons for its decisions. I am submitting for the record an Appendix outlining some of those decisions, and point out here only some of the criticism the courts have had about the Frazier FLRA:

- "unreasonable to the point of irrationality";
- "ignor[ing] its own rules and precedents";
- "an example of a familiar defect of statutory construction";
- "wholly without basis in law";
- "seeking to denigrate the role of the Union"; and

- "no plausible reason ... for [an] anomaly arising from [the FLRA's] crabbed construction of the [statute]".

Besides the courts, labor-management practitioners have found fault with the FLRA's performance. A survey conducted by the Society of Federal Labor Relations Professionals, a group composed largely of managers but also neutrals and union representatives, found the FLRA's decisions inconsistent, poorly written, untimely, and lacking in reasonable remedies for violations of law. The survey rated the FLRA's performance as ineffective and unsuccessful in improving the federal labor-management program.

When reviewing the dismal record of inconsistency and absence of leadership that the FLRA has chalked up during Mr. Frazier's tenure, it isn't difficult to find reasons for the practitioners' dissatisfaction. For example:

- it took the FLRA 6 years to finally resolve, reversing a previous decision, whether unions have the right to initiate changes in conditions of employment at times other than when a contract is being negotiated;
- on the question of layoffs, the FLRA has likewise failed to be consistent in holding that a federal agency

must negotiate what portion of the agency laid-off employees can look to for new jobs;

- the FLRA also flip-flopped on an agency's obligation to bargain at all, an obligation that has depended on any one of a number of tests which the FLRA created whole cloth: the "substantial impact test", the "de minimis" test, the modified "de minimis" test, and so forth. "

From these examples, which are more fully discussed in Appendix 2, I trust you get the impression that there are major problems with the federal sector labor-management program. In order to improve that program, the leadership positions of the FLRA must be held by effective, efficient, and consistent appointees. I do not expect AFGE to win every case that we bring to the FLRA, and I do not criticize the performance of other appointees you are considering in these hearings - even though federal employees are also affected for example, by the Merit Systems Protection Board. AFGE will take its lumps from any agency - along with its wins. But at least agencies like the MSPB have a degree of intellectual integrity. They don't turn out untimely, whimsical, and convoluted decisions that are commonly criticized by the courts, that are unintelligible to practitioners, and that cause employee frustration throughout the federal service. The Frazier FLRA is guilty of all these faults.

Mr. Frazier's record demands that as the person most responsible for the FLRA's failings, he be rejected for reconfirmation. After more than a decade as an administrator of two federal sector labor-management programs, his reappointment would result in continued incompetent performance. Although small in size, the FLRA impacts the entire federal workforce and the public it serves; a disastrous record such as Mr. Frazier is responsible for would not merit serious consideration for reconfirmation in a large, visible agency like the Department of Defense. Congress should likewise not put up with it in the Federal Labor Relations Authority.

Henry Frazier has failed the critical elements of leadership, timeliness, court review, and consistency. Any other employee with a similar record would be quickly discharged from federal employment to promote the efficiency of the service. To hold Mr. Frazier to any less of a standard would be an abdication of this Committee's responsibility.

Thank you.

APPENDIX 1

DISCUSSION OF COURT REVERSAL OF FLRA

1. It has not been unusual during Mr. Frazier's tenure for cases to languish at the FLRA for up to four years before a decision on them is made. On March 26, 1986, the General Accounting Office reported that in fiscal year 1985 one-third of the FLRA's backlog of negotiability appeals was 721 days old. The problem was so bad that AFGE had to go to court to get the FLRA to act on some cases. The U.S. Court of Appeals for the District of Columbia Circuit issued a decision highly critical of the FLRA on May 6, 1986. The Court called the FLRA's past record of delay intolerable, particularly because the usefulness of the FLRA depends on its timely action. The Court said the FLRA's untimely action renders its decisions "beside the point" and characterized its performance as "sad". Only because the new FLRA Chairman, Mr. Jerry Calhoun, has committed the FLRA to wiping out the backlog of cases within a year and to reducing processing time of new cases to 6 months did the Court relent on imposing the specific timetables for decision making that were requested in the lawsuit. It is a telling indication of the incompetence of the FLRA during Mr. Frazier's tenure that unlike Mr. Calhoun, Mr. Frazier did nothing to solve this untimeliness problem. Nor did Mr. Frazier ever mention untimeliness in a dissenting decision when cases were finally decided. As far as anyone can tell, the "sad" performance of the FLRA was just fine with Mr. Frazier and

must be laid at his doorstep. What is most troubling is that Congress specifically anticipated vacancies in the FLRA and wrote into the law the authority for the FLRA to act even when there were not three sitting Members. What good is the CSRA when the agency designated to administer its provisions just doesn't do so? The chronic problem of untimeliness contravenes the statutory requirement that the FLRA promote efficiency in the Government.

2. Another major problem with the FLRA's record has been its total disregard for its own regulations regarding stays of arbitration awards that were under appeal. An important provision of the law provides that arbitration awards are final and binding with limited appeal to the FLRA. Therefore, the FLRA's regulations clearly provide that awards are to be implemented pending a decision on appeal unless a stay is granted by the FLRA for good reasons. Obviously, the value of arbitration is its effect as a tool to get a third party resolution of work disputes in a timely manner before situations become explosive at the worksite. The FLRA's own regulations specifically state that stays are not to be granted automatically, but must meet certain standards. Those standards are that the appeal must demonstrate likelihood of success and that there be a balancing of the interests of all parties. The FLRA during Mr. Frazier's tenure failed to apply these standards. Instead, anytime a request for a stay was made, it was automatically granted de facto in that a stay went into

effect pending a decision on the request itself. In a sleight of hand maneuver - a Catch-22 for unions - Mr. Frazier's FLRA simply neglected to rule on any stay requests. When the FLRA's decision on the appeal itself was issued, sometimes several years later, the request for stay was then mooted. The net result of the FLRA's non-action on arbitrations stays is that employees cannot obtain timely relief because the employer either files a request for a stay which is granted de facto and irrespective of the standards provided for by the FLRA's own regulations; or, the employer neglects to request a stay but is allowed to violate the arbitration award until the appeal is decided. Either way, the arbitration award is rendered useless as the workplace's substitute for expensive and time-consuming litigation.

To correct this Catch-22, AFGE again went to court. The U.S. Court of appeals for the District of Columbia issued a decision on November 23, 1985 which said the FLRA had "emasculated its own regulations" by "fail[ing] to even mention the significance of the regulation, much less [providing] a coherent justification of the abandonment of ..statutory interpretation embodied in that regulation....The FLRA's decision ... does not qualify as reasoned decision making...[and] ignores its own rules and precedents." In this instance, the Court remanded the case to the FLRA's for action consistent with the Court's decision.

3. Yet another Court decision of the D.C. Circuit, issued June 20, 1986, criticized the FLRA for usurping the role of Congress in placing certain matters outside the obligation to bargain. The Court said

It is for Congress, and not for the [FLRA] or the courts to determine what means [Congress] is willing to employ to achieve particular ends, and it usurps that prerogative to say that if Congress had rendered work assignment nonbargainable, then also nonbargainable is any activity that has the same effect as work assignment...we remand for further proceedings in accordance with this opinion.

4. The U.S. Court of Appeals said in June 27, 1986 decision that the FLRA's decision in a case before it was "wholly without basis in law". The Second Circuit said on March 24, 1986 that the FLRA "denigrated the role of the Union" and "ignore[d] the Congressional determination that collective bargaining in federal employment is in the public interest..". There have been numerous other court decisions critical of both decisions of the FLRA and the twisted or non-existent logic by which those decisions were reached.

5. In the period between October, 1985 and June, 1986, of 27 court decisions on challenges to the FLRA's performance, the courts rejected the FLRA's decisions and rationale 9 times; this is a "report card" on Mr. Frazier's performance that is far worse

than the performance of a comperable agency, the National Labor Relations Board. In fiscal year 1985, 89% of the court decisions issued supported the Board's actions; in these cases involving decisions of the FLRA during Mr. Frazier's tenure, only 67% of the time was the FLRA's decision upheld despite what we know is a judicial standard that requires great deference to an administrative agency's interpretations of its own statute - absent decisionmaking that is irrational or plainly contrary to law.

APPENDIX 2

DISCUSSION OF FLRA INCONSISTENCIES

1. It took the FLRA 6 years to finally resolve whether unions have the right to initiate changes in conditions of employment at times other than when a contract is being negotiated. The FLRA danced around the issue, seemingly interpreting the law in favor of unions in 1982 (9 FLRA No. 51), but not clearly and unambiguously taking a stand until 1985, when it reversed the previous interpretation (17 FLRA No. 103). One must appreciate that this question is not an abstract question of primary interest to scholars, but a real concern of unions, agencies, and employees that arose early and often since passage of the CSRA. In the absence of an early and consistent stance, the FLRA directly caused confusion and labor-management disputes for 6 years that need not have occurred.

2. The FLRA has likewise failed to be consistent in the sensitive area of layoffs. On the issue of whether agencies must bargain on the competitive area of a layoff, the FLRA has answered various ways. In 11 FLRA No. 54, for example, the FLRA said such areas are bargainable, but in 14 FLRA No. 98, it said they aren't. A competitive area is important to employees because it defines which segment of an agency is to be available to an employee who wishes to accept a new job when the employee is

displaced from a prior job because of the layoff. In no way does the determination of competitive area prevent the layoff, so the efficiency of the government is not at issue. Yet the rudderless decisions of the FLRA directly caused added confusion, anxiety, and disgust within the federal workforce to the low morale caused by the layoffs themselves.

3. The FLRA also flip-flopped on the question of an agency's obligation to bargain on anything. In 1981, the FLRA devised a "substantial impact" test (5 FLRA No. 45) from whole cloth - not from Statutory language - which said that an agency's obligation to bargain on a change it wanted to make arose only if the change had "substantial impact" on employees. In 1983, again out of whole cloth, the FLRA imposed a new test - the "de minimis" standard - but it took until 1985 for the FLRA to provide even illustrative criteria that explain what the "de minimis" test meant. The conflict that occurred between 1981 and 1985 in federal sector labor-management relations as a result of these mixed signals was extensive, and caused, in turn, the filing of numerous unfair labor practice charges because labor and management wanted to protect their rights to bargain or to not bargain. The point is that the FLRA, contrary to its statutory obligation, did not provide leadership but actually caused confusion, unnecessary litigation, and stagnated labor-management relations.

Appendix 3
FRAZIER FACT SHEET

AFGE strenuously opposes reconfirmation of Mr. Henry B. Frazier, III, as Member of the Federal Labor Relations Authority.

The basis of any reconfirmation hearing should be the past performance of the appointee. No less than any other Federal employee, Mr. Frazier's performance should be scrutinized and measured to see if it is at least minimally satisfactory in critical aspects. Federal workers in the competitive service must meet such scrutiny and can be fired, demoted, or laid off for sub-par performance. Mr. Frazier is not subject to that competition, but reconfirmation hearings serve the same purpose.

STATUTORY FRAMEWORK

The Federal Labor Relations Authority (FLRA) is the federal worker's "National Labor Relations Board". The labor law which established the scheme for federal workers' workplace representation is the Federal Service Labor-Management Relations Statute ("the Statute"), Chapter 71 of the Civil Service Reform Act of 1978, as amended.

The Statute clearly spells out what the FLRA is obligated to do; as a top-level employee, Mr. Frazier's "Position Description" is also the Statutory mandate of the agency itself.

1. The FLRA "shall provide leadership in establishing policies and guidance relating to matters under [the Statute] and...shall be responsible for carrying out the purposes of [Chapter 71]" (5 U.S.C. 7105(a)). The purpose of Chapter 71 is "to prescribe certain rights and obligations of the employees of the Federal Government and to establish procedures which are designed to meet the special requirements and needs of the Government." (5 U.S.C. 7101(b)). Moreover, one of the considerations which the Statute specifically imposes on the FLRA is effectiveness and efficiency in government.

2. The FLRA is specifically charged with:

- determining which federal workers can be represented by a union;
- resolving disputes about when and on what subjects unions and federal agencies must consult or negotiate;
- finding agencies and unions guilty of illegal acts ("unfair labor practices");
- determining which appealed arbitration awards are legal; and
- taking any "other actions as are necessary and appropriate to effectively administer the provisions of the federal labor law (5 U.S.C. 7105(b)).

In order to fulfill those obligations, the FLRA must consistently interpret the law, adhere to the precedents it establishes, act in a timely fashion and render reasonable remedies for violations of the law.

The failure of the FLRA to satisfactorily, or even minimally, meet these standards threatens the very existence of meaningful labor-management relations in the Federal sector and denies common sense justice to millions of federal workers. This failure of the FLRA to carry out Congress' clear intent must be placed at the feet of the only continuous appointee to the FLRA - Henry B. Frazier. As Mr. Frazier testified before the Senate Subcommittee on Federal Expenditures, Rules, and Research on May 20, 1982, he is "the one with the longest tenure in the Federal labor relations program, among the three [FLRA] Members". Mr. Frazier also served as Executive Director of the FLRA's predecessor agency, the Federal Labor Relations Council; his poor performance can, therefore, in no way be attributed to inexperience.

"CRITICAL ELEMENTS"

Mr. Frazier's performance dismally fails to even approach a minimally satisfactory level in every "critical element" of his position:

LEADERSHIP FAILURE

A survey completed several months ago by the membership of the Society of Federal Labor Relations Professionals, an organization comprised of management, union, and neutral labor-management practitioners and the only organization of practitioners dealing exclusively with the FLRA on a day-to-day basis, found the FLRA's decisions inconsistent, poorly written, untimely, and lacking in reasonable remedies for violations of law. The survey rated the FLRA's performance as ineffective, and unsuccessful in improving the federal labor-management program over the woeful Executive Order program which Congress fully intended the CSRA, as interpreted by Mr. Frazier and his fellow FLRA Members, to improve.

UNTIMELINESS

In a U.S. Court of Appeals (D.C. Circuit) decision, issued May 6, 1986, the Court cited the FLRA's past record of delay and called it intolerable. The Court said that, although the usefulness of the FLRA depends on its timely action, long delays such as those that have been chronic under Mr. Frazier's tenure as Member and Acting Chair, render the FLRA's decisions "beside the point". The Court has repeatedly chastised the FLRA for its delays in deciding cases, calling its performance during

Mr. Frazier's service "a sad performance". In deference to the new Chair, Mr. Jerry C. Calhoun, the Court decided not to act on the FLRA's dismal record for the time being, but expressly left the door open for reinstatement of the charges if the promised improvement under Chairman Calhoun's leadership doesn't turn the FLRA's record around from what it has been during Mr. Frazier's tenure.

In a GAO report entitled "Federal Labor Relations Authority and Administrative Roles and Case Processing", dated March 26, 1986, the GAO reported that "about a third of all pending [negotiability appeal] cases pending in FY 1985 were over 721 days old...due to the lack of a third member [of the FLRA]". In other words, even though the law specifically provides that vacancies on the FLRA don't affect its power to act, cases filed two years previously were still undecided because a third Member hadn't been confirmed. In that same GAO report, Mr. Frazier asserts "one individual [the Chair of the FLRA] is responsible and accountable for the administration and allocation of appropriated funds within FLRA..". Mr. Frazier was Acting Chair from September 1984 until December, 1985.

Perhaps most significant is the commitment of the new Chair, Mr. Calhoun, to eliminate the FLRA's long-standing backlog within one year and to provide a 60-day disposition of all new cases. With fewer resources, Mr. Calhoun's competent leadership is improving the FLRA's efficiency record by reducing processing time by up to 5/6 as compared to the 721-day-old caseload that the GAO found at the FLRA during Mr. Frazier's tenure. Whatever Mr. Calhoun's success may be, the untimeliness of the FLRA during Mr. Frazier's tenure cannot by any stretch of imagination be considered to meet the requirement of the Statute that the FLRA promote the efficiency of the Government (5 U.S.C. 7101(b)).

REVERSAL AND CRITICISM BY THE COURTS

In FY 1985, the National Labor Relations Board was at least partly upheld in 168 of the 188 decisions on which the Board decision was reviewed in a court appeal; the Board, according to the courts, was correct 89.3% of the time. By contrast, the Frazier-led FLRA was reversed or remanded in 9 of the 27 decisions of the courts that were issued between October, 1985 and June, 1986 (all of which addressed FLRA decisions made while Mr. Frazier was either a Member or Acting Chair); the FLRA was correct only 67% of the time.

As atrocious as the reversal rate is, however, a worse "report card" is the courts' repeated criticism of the manner by which the FLRA made decisions during the Frazier tenure:

a. The U.S. Court of Appeals (D.C. Circuit) in a November 23, 1985 decision issued while Mr. Frazier was Acting Chair, said

"in short, the Authority has effectively emasculated

its own regulations [regarding granting of requests to stay arbitration awards] by means of a brief, summary opinion that fails to even mention the significance of the...regulation, much less to provide a coherent justification of the [FLRA's] abandonment of the statutory interpretation embodied in that regulation.

The FLRA's decision...does not qualify as reasoned decision making. The FLRA is entitled to seek to alter its established regulation and interpretation... but if it wishes to do so, the Authority will have to proceed openly and directly, by following established rulemaking procedures, rather than indirectly by means of an adjudication that ignores its own rules and precedents. Accordingly, the FLRA's order is vacated and the case is remanded for further proceedings consistent with this opinion." (Underscoring added.)

b. The U.S. Court of Appeals (D.C. Circuit, Docket No. 84-1292, dated June 20, 1986) said of the FLRA's "reasoning" in a dispute about superior performance pay, that the FLRA decision

"is an example of a familiar defect of statutory construction that might be called substituting the end for the means. It may well be that the rights to assign work and to reward superior performance of assigned work are both means to the objective of enabling the agency to determine its work priorities, just as the carrot and the stick are both means of getting a donkey to move. But the similarity of purpose does not establish that when Congress says carrot it means stick as well. It is for Congress, and not for the Authority or the courts, to determine what means [Congress] is willing to employ to achieve particular ends, and it usurps that prerogative to say that if Congress had rendered work assignment nonbargainable, then also nonbargainable is any activity that has the same effect as work assignment. If the latter principle were applied consistently, it is difficult to imagine any agency prescriptions regarding terms and conditions of work that would remain bargainable...we remand for further proceedings in accordance with this opinion." (Underscoring added.)

c. The U.S. Court of Appeals (D.C. Circuit, Docket No. 85-1378, dated June 27, 1986) said of the FLRA that its ruling in a dispute about a right to information was "wholly without basis in law". The case involved the right of a union to receive information from an agency concerning discipline of bargaining unit.

employees; the agency had refused to provide the information on privacy grounds, even though in the federal sector a union is required to represent the interests of all employees in the unit of recognition. In reversing the FLRA, the Court noted the union's obligation and called the FLRA's decision "a somewhat extraordinary interpretation of [federal labor-management law]".

d. In a Second Circuit decision (Docket No. 85-4144, March 24, 1986) the U.S. Court of Appeals was highly critical of the FLRA's 1985 decision - issued while Mr. Frazier was Acting Chair - that denied AFGE the home names and addresses of unit employees. Agreeing with the Administrative Law Judge that the legal right to that information depends on balancing the privacy interests of the employees with the representational interests of the union, which the FLRA had flatly refused to do, the Court said

"the respondent [FLRA] and intervenors suggest that release of the addresses would not be in the public interest. By labelling the AFGE's interest 'proprietary', they seek to denigrate the role of the Union. The AFGE, it is suggested, desires the disputed information merely to solicit union membership. This view, however, ignores the Congressional determination that collective bargaining in federal employment is in the public interest, and that a union, as exclusive bargaining agent, must communicate with the employees it represents...In the private sector, we have decisively rejected fear of union solicitation as a ground for failure to release addresses." (Underscoring added.)

Concluding that release of home addresses involves only a modest privacy interest, the Court held that the FLRA erred in not finding the employing agency guilty of an unfair labor practice, and went so far as to order the FLRA to enter "an order consistent with that of the administrative law judge."

e. The U.S. Circuit Court (D.C. Circuit, Docket No. 85-1904, March 11, 1986) took strong exception to the failure of the FLRA to apply appropriate private sector standards to remedy violations of law by federal agencies. The Court, according to the decision,

"has previously recognized that Congress intended the FLRA's role in adjudicating unfair labor practice cases in the federal sector to be similar to that of the NLRB's in the private sector...It is therefore appropriate that we consider the decisions of the NLRB..."

The FLRA, acting like a rogue elephant in trampling this established judicial and statutory obligation, simply created its own law - excusing the agency's violation by refusing to require a meaningful remedy solely because the agency claimed budgetary constraints. The Court concluded

"Federal agencies with collective bargaining agreements should not think that henceforth they can disregard, because of changes due to budgetary problems, their collective bargaining obligations, at the risk of nothing more than a slap on the wrist [which] would seem to give the employer little incentive to comply with the bargaining obligation under the Statute...Congress did not intend the rights of federal unions and employees to be so much different from those of private employees and unions under the National Labor Relations Act."

INCONSISTENCY

During Mr. Frazier's tenure, the FLRA has failed to provide direction and guidance by inconsistently interpreting the Statute.

a. An issue that is basic in labor-management relations is whether a union, or only agencies, have the right to initiate bargaining during the life of a contract on matters not covered in the contract. In 1982, the FLRA said yes (9 FLRA No. 51); then after having given that clear signal to the entire labor-management community, the FLRA said no (17 FLRA No. 103) in 1985. There was no rationale or explanation contained for this revisionist action, and the entire labor-management community - union, management, and neutrals - went more than 6 years before this constantly-arising question was answered by the FLRA.

b. In another area that frequently arises, the FLRA has flip-flopped on whether an agency must negotiate the competitive area when laying off workers; basically, this is only negotiation of which segment of an agency is to be available to an employee who wishes to accept a new job due to abolishment of the current job. It in no way prevents an agency from eliminating positions. The decisions of the FLRA have vacillated from approval of such negotiations (e.g., 11 FLRA No. 54) to disapproval (14 FLRA No. 98). Once again, the FLRA was all over the lot without apparent rationale for changing its interpretation of the law.

c. The FLRA has flip-flopped on an agency's obligation to bargain at all. In 1981, the Authority devised a

"substantial impact" test (5 FLRA No. 45) from whole cloth - not from Statutory language - which said that an agency's obligation to bargain on a change it wanted to make arose only if the change had "substantial impact" on employees. In 1983, this test was replaced by the "de minimis" test, but it took until 1985 for the FLRA to provide criteria - even then only illustrative criteria - to explain the meaning of the "de minimis" test.

PERSONAL QUALIFICATIONS

In a GAO report entitled "Deficient Management Practices At The Federal Labor Relations Authority -- Action Being Taken", dated February 2, 1983, that independent watchdog stated "...the FLRA contract prices [were] at least double GSA prices." This was a reference to procurement practices at the FLRA. The FLRA was found by GAO to have violated GSA Federal Property Management Regulations, to have ignored the President's moratorium on furniture procurement, to have violated the Anti-Deficiency Act, and possibly to have made improper salary payments to an FLRA official.

The Report states that the GAO was told the Members of the FLRA get what they want "because they are Presidential appointees". Acting with that attitude, the FLRA bought furniture with no regard for tax dollars: even the Pentagon would be embarrassed to pay, as the FLRA did, \$765 for a chair, for example.

The GAO concluded that "FLRA officials apparently received, read, and discussed the Presidential memorandum which banned procurement of furniture", which was issued more than 4 months before the FLRA procured the furniture.

Although the GAO believed the FLRA's Members' promise to take steps to prevent repetition of these violations, the fact remains that the Members of the FLRA broke the law. And, while the FLRA Members explained away their own actions to GAO as "good faith misunderstanding on everyone's part", there is clear evidence that Mr. Frazier knew more than he testified to and thus did not act in good faith. Before the Senate Subcommittee on Federal Expenditures, Research, and Rules on May 28, 1982, Mr. Frazier's testimony included the following explanation of the procurement violations:

Frazier prepared statement, at page 21: I have stated that I was not aware at the time of the selection or the purchase of the furniture of prices associated with the individual pieces. This is correct. I did not learn of the prices until the furniture began to be delivered...in December, 1980, my staff assistant [Holly Hemphill] received a listing of certain

items...with estimated retail prices from our contracting officer. When she told me she received a list of the furniture designated for our offices, I quickly dictated and initialed a note to the contracting officer, the purpose of which was in the nature of a confirmation...I did not review the list or take any note of the prices. There was no discussion between me and my staff assistant regarding prices...

The same hearings, however, revealed testimony from Mr. Richard Wolfe, who had been the office services manager for the FLRA during the procurement violations.

Mr. Wolfe:.. Now, Mr. Shepard was just asked a question as to if he was aware of the price of the furniture. I cannot swear that he knew of the price of the original contract. I can, however, swear that he was aware, as were two other people aware [one of whom was Mr. Frazier's assistant, Holly Hemphill], of the second modification...

Mr. Wolfe further testified that Ms. Hemphill had been given copies of the procurement contract and modifications to it, well before the furniture began to arrive and well before Mr. Frazier said he knew of the prices.

SUMMARY

Henry B. Frazier, III has a record as a Member of the Federal Labor Relations Authority that is appalling. It flies in the face of the Statute which the FLRA administers to consistently and thoroughly hamper the federal labor-management program as Mr. Frazier has done. Labor-Management professionals don't know what to expect and don't understand the FLRA's decisions. The FLRA has allowed cases to languish far beyond any useful disposition of the matter in dispute. Actions and decisions of the FLRA have been capricious, and without regard to reasoned application of precedents. When decisions issue on matters that recur, the FLRA's interpretation of the same law is an unfathomable labyrinth that causes confusion within the labor-management community and the federal workforce. And, the FLRA during Mr. Frazier's tenure has been marked by disregard for its own administrative regulations and the federal procurement laws.

Mr. Frazier's record demands that as the person most responsible for the FLRA's failings, he be rejected for reconfirmation. After 16 years as an administrator of two Federal labor-management programs, his continuation would produce only more incompetent performance. Although small in size, the FLRA impacts the entire federal workforce and the public it serves; a disastrous record such as Mr. Frazier is responsible for would not merit serious consideration for reconfirmation in a large, visible agency like the Department of Defense. Congress

should likewise not put up with it in the Federal Labor Relations Authority.

APPENDIX 4

REBUTTAL TO FRAZIER MATERIAL SUBMITTED FOR THE RECORD

Statistics Requested by Senator Stevens:

Frazier stats show he doubled his and the FLRA's reversal of ALJ decisions when he became Chair, and almost tripled his and the FLRA's granting exceptions to arbitrators' awards.

1. The footnotes support our observation that Frazier "is" the FLRA and should take credit or blame for it.
2. Frazier admits¹ the FLRA during his Chairship that the FLRA instituted an "abbreviated decision format" procedure to clean out "clearly unmeritorious" exceptions.
 - a. That would necessarily prejudice the task force created to look for such cases and deprived parties seeking exceptions of due process by a neutral reviewer.
 - b. Did the FLRA publish new regulations (or even make a public announcement) as to its abbreviated decision format? Is this a violation of the APA?
 - c. By suggesting 1984 and 1985 be lumped together, Frazier is admitting cases were decided in 1985 which were deliberately held from 1984 and not acted upon because of the "abbreviated decision" task force. This demonstrates a desire to artificially inflate case closings when Frazier took over the Chairship at the expense of cases which were older but more time consuming.
 - d. If 20% is the historical average for arbitration exceptions that succeeded, why does the 1984-85 rate rise to 74% in the FLRA Statistics, Volumes 15-20? That some cases are procedurally deficient (e.g., untimely) is not the explanation because Frazier's explanation is that 1984 and 1985 are averageable to typical years. So untimely appeals factor out and are irrelevant.
 - e. What about the jump in ALJ decision reversals? Why didn't Frazier ask someone to analyze and explain that? What's his explanation?

¹ Through his apparent endorsement of the Supervisory Attorney's analysis and explanation.

Regarding "leadership":

1. We (12p) had an arbitration appeal for the Lebanon, Pennsylvania VAMC local. The appeal languished for a long time. Finally, we submitted suggested regulation changes to require stricter application of arbitration stays,³ citing delays in this appeal. We got a quick negative decision on the appeal and a rejection of our regulation suggestion.
2. What message does that send to someone who wants to work to improve the system?
3. The above experience demonstrates how, early on, stays were improperly granted and the FLRA knew it, yet it took a recent (November '85) court decision to get the FLRA to follow its own regulations.

³ We said -- require demonstration that stay criteria were met, not just bare assertion without specifics.

Regarding the "failure to minimally meet the mandate of the CSRA":

Frazier obfuscates the SFLRP survey results. SFLRP respondents didn't criticize results of specific decisions. They criticized overall "view of collective bargaining", quality of decisions of the FLRA, and untimeliness.

Moreover, as Tobias noted in response to Eagleton's questions, it is not only labor and neutrals who were critical -- management representatives were highly critical in the survey and they are the vast majority of SFLRP members.

Regarding the Correct Interpretation of 9 FLRA No. 51:

1. Frazier cites 16 FLRA 602 as a case where the FLRA explicitly rejected the union's right to initiate mid-term bargaining. Yet in that very case, at page 614, the ALJ -- not an unsophisticated man on the street -- also read 9 FLRA No. 51 the way unions do.
2. But the point isn't whose view is "correct" -- the courts will decide that. The point is A) 9 FLRA No. 51 has led to repeated litigation because it said -- or seemed to say one thing -- but the FLRA said something else three years later; the decision is useless and typical of lack of clear FLRA guidance in crucial areas; and B) the FLRA gave no explanation for "rejecting" the ALJ's view -- another case of capricious decisionmaking (see page 602).
- *3. If the bracketed sentence on page 3 is supposed to be an accurate "quote" from 9 FLRA No. 51, it's not. The full quote (pages 423-424, see attached) is a much clearer and stronger statement,² particularly in the context of the other rationales (that the defenses of past practice and waiver were not convincing).

*Underscored language from the original decision was left out of the "quote" by Frazier. It's outrageous that he would try to deceive the Committee -- or is he so incompetent he can't get a simple quote right?

² Frazier's instant quote is extremely misleading (opinion) and not a quote at all (fact). 9 FLRA No. 51 says (and this is a quote):

"In any event, the Library's contention that it had no duty to bargain with regard to changes in conditions of employment proposed by the CREA but only with regard to changes proposed by the Library is clearly inconsistent with the definition and purpose of collective bargaining under the Statute and therefore cannot be sustained."

Frazier Responses to
Issues Raised

"16 Step" Case Tracking
System

"cases don't go through
all 16 steps"

"the system was insti-
tuted by the Executive
Director.... I did not
change it."

* * *
"However, I did [make]
management improvement
initiatives."

* * *
"Executive Director may
have made refinements at
his level."

Summary: Frazier's explanation is circular -- he says he
didn't change the system but he made only management improve-
ments, including changes to the system made by the Executive
Director. Is this an attempt to take credit or not? Why is a
management improvement initiative not a "change" in the system?

AFGE
Comments

They can go through as many
as 12 "points": 1, 2,
*3/4, *5/6, 7, 8, 9, 10,
11, 12, *13/14, 15, & 16.
*(One or the other, but not
both.) But see below.

Then why does the 10/01/85
press release say the
improvement initiatives
include:

1) "compressing the levels
of review" -- while Frazier
says the levels of review
are only 3 and the system
wasn't changed; and

2). "refinement of the
computerized case tracking
system".

Background Material Requested by Senator Eagleton Concerning
the FLRA's Consideration of the Question of a Separate vs. a
Unitary Staff:

1. Regarding the bracketed sentence on page 1:

The staff system Frazier endorses is one which blows with the changing whims of Members instead of hewing to a consistent application of the law which can be passed on to new Members. No wonder the decisions are garbled -- the staff is professionally schizophrenic! This is the best reason to go to separate staffs yet heard!

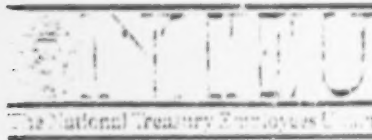
2. Regarding the bracketed sentence on page 3:

For form sake, we should respond: Our opposition to a unitary staff structure doesn't disappear simply because Frazier, and now Calhoun, refuse to bend in the middle of sensitive reconfirmation hearings.

Responses to "McGinnis Unaware of Cases in Abeyance":

1. The fact that Source Book memoranda refer to memos included therein as being dated January 14, 1985 means it took 105 days for Frazier's FLRA to prepare the background/status report on abeyance cases for McGinnis. Why so long? When did McGinnis come on board? January 1985 isn't "shortly" after 9/84.
2. It's outrageous that Frazier allowed or continued abdicating responsibility for new cases that presented an issue present in an "abeyance case". The "staff" should not be making that decision. That's an attempt to delegate responsibility and no theory of management permits it.

Secondly, because all cases are distinct, wouldn't Members want to see all new cases as a way to rethink or reapply the legal issues and maybe break the logjam?



TESTIMONY OF ROBERT M. TOBIAS
NATIONAL PRESIDENT

NATIONAL TREASURY EMPLOYEES UNION
BEFORE
SENATE GOVERNMENTAL AFFAIRS COMMITTEE

JULY 16, 1986

Thank you Mr. Chairman

I am Robert M. Tobias, National President of the National Treasury Employees Union. We are a union of 110,000 federal employees in sixteen different agencies. We have been very active in the federal sector labor relations program since the late 1960's. Since then, our union has been involved in negotiating contracts, in filing lawsuits, in lobbying Congress, in working with the media to expose problems, and in representing individual or employee classes in virtually every appeal process available in the federal sector. I believe we are very experienced and knowledgeable about the process.

As we begin, I want to assure this committee that we have not come here to complain about the substance of any decisions issued by Mr. Frazier. We do not believe that labeling him pro-management or pro-union is helpful to anyone today. Our concern is rather with the issues we believe the Senate should be focused upon. We suggest that this inquiry should center on the answer to three questions:

1. Has Mr. Frazier properly managed the FSLMR program?
2. Has he acted to ensure that the FLRA has provided the parties with leadership in this program?
3. Does his personal behavior show he is worthy of Senate confirmation and to be entrusted with control over this program for the next five years?

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Mr. Frazier's nomination differs from that of so many others because in his case the Senate is examining whether to reconfirm him. This is not his first nomination to this position. As such, the Senate has a track record of his performance. It is in a position to determine whether he has done what is expected of a person in a position such as the one in question. If it votes to confirm, it will be voting to accept the record he is responsible for; if it rejects his nomination it will be sending a signal that it is displeased with his record and that it wants the agency to act more efficiently. One way or the other, the committee will be taking responsibility for the past and future performance of the FLRA.

Our analysis shows that performance in each of these areas is woefully deficient. At the conclusion of our presentation we will ask the Senate to deny reconfirmation because this multi-million-dollar program he has managed and guided shows serious failings on all fronts and no examples of excellence. We will ask the Senate to reject this performance record by rejecting the person most responsible for it.

Mr. Frazier is not just another member of the Authority--a mere one vote out of three. He is the one constant thread running through the fabric of FLRA failures. He is the holdover from the old and limited FLRC program; he is the only member remaining from that period; he has built a unitary staff

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that in truth serves him, rather than the Authority, resisting all change; and he presided as Acting Chairman during a time of critical decline for the agency.

Mr. Frazier has been associated with federal sector labor relations since the mid-60's when it was created through a series of Executive Orders. He served as the Executive Director of the FLRC, a body of agency managers which set program policy.

When the Congress rejected the E.O. concept in favor of a statutory basis, it replaced the FLRC with the FLRA, but Mr. Frazier continued with the program through his appointment to the FLRA. Although some remarked that his experience would be valuable to the new program, others, such as ourselves, questioned whether or not the effect of his appointment would be to doom the new program to be a mirror image of the old with all the flaws Congress sought to override through the passage of a statute. We believe we have been proven correct based on his management, leadership and personal behavior while at the FLRA.

During the course of Mr. Frazier's tenure which is the entire life of the FLRA, no fewer than three GAO reports have been issued dealing with the FLRA's performance. Each has severely criticized the Authority's inability to timely process its caseload. Because the GAO estimated the cost of processing

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a single Unfair Labor Practice (ULP) in 1982 to be as high as \$21,276 (See p. 6-GAO/82), it identified timely case processing as a primary goal for the Authority. At the time of the first GAO report, of the 427 ULP's pending at the Authority, the median age was 288 days. In its most recent report, GAO found the median age of these cases had climbed to 655 days.

Even more startling was what had happened to negotiability cases. These involve labor-management parties temporarily breaking off bargaining to pursue a ruling as to whether a proposal is legally negotiable. Under the statute¹², these cases are entitled to the most expeditious possible review. In its report the GAO found 1/3 of these cases were over 721 days old. This is like a Congressional committee adjourning temporarily to pursue a decision on a rule only to have to wait two years for a decision. The taxpaying public could justifiably roar with laughter over performance statistics like this. It is numbers like these that cause the general public to be disgusted with government. But perhaps more important is the enormous cost invested by the taxpayer in this cumbersome litigation, only to have a decision rendered long after the time-sensitive controversy has passed. The FLRA has been repeatedly censured by the courts for this dismal performance, and narrowly escaped being forced by a writ of mandamus to issue negotiability decisions far more quickly.

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Last year the Society of Federal Labor Relations Professionals, the professional society for federal sector representatives of labor and management as well as neutrals, surveyed its members to determine their views on the federal sector labor-management program. These professionals, who work with the program every day, responded that 70% believe the Authority's negotiability and unfair labor practice decisions are "seldom timely." In short, the Authority's poor performance is unacceptable and unexplainable to the vast majority of practicing professionals, labor and management.

It is important to remember that GAO found a ULP can cost \$21,000 in 1982 dollars. For each week the Authority fails to issue a decision on a question of a law, new cases are often filed on the same issue by other parties. That means another case comes into the system incurring its daily share of the \$21,000 cost. In 1986, GAO found that there were as many as 89 cases pending on the same issue; that is a waste of \$1,869,000. At these prices, someone needs to ask why after three GAO critical reports this is allowed to continue.

Mr. Frazier and his staff are the constants throughout this performance. During his acting chairmanship, things went from bad to worse. FLRA member McGuinnis, who left the FLRA in 1985, publicly railed about this outrage. He blamed Mr. Frazier and the FLRA staff loyal to him. This group had

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created a 15 step procedure to process cases. Member McGuinnis noted that the NLRB and many state labor agencies process much larger inventories faster, but that Member Frazier resisted these practices because it would break up the "entrenched staff." When contacted by the media Mr. Frazier's only rebuttal was that case processing was "almost as slow" after Mr. McGuinnis arrived as before. If that was the only defense offered by one of our bargaining unit members to allegations of inefficiency, he would soon be unemployed. If one of your members attempted to defend poor performance in this way to a constituent group, he/she would not make it through a primary. Why should Mr. Frazier be allowed to keep his job, if that is his only response to a poor record.

Again, the only constant during the early years of the Authority when this delay developed was Mr. Frazier and this staff. Mr. Frazier has continually resisted adopting the NLRB staff structure indeed the standard administrative staff structure, which gives each Board member his or her own staff. Obviously, a unitary staff benefits only that member who outlasts all the others because the staff knows that member has more control over their future. In this case, Mr. Frazier has used it to resist change at the price of timely, low cost case processing.

NTEU has been able to focus the blame for this problem even more clearly on Mr. Frazier. We have obtained records which show that as of the week of June 20, 1986, the FLRA staff had

72 cases before the current members of the Authority, i.e. Messrs Calhoun and Frazier. These cases were ready for decision. Of the 72, Chairman Calhoun had issued his vote in 33. Yet, Member Frazier had been able to get around to deciding only 12 of them even though some had been forwarded to him ready for decision over six months earlier. It is hard to imagine a reason why Chairman Calhoun, a relative new comer to this area of the law, could produce decisions almost three times as fast as someone as allegedly experienced as Mr. Frazier. The desire to "reflect" is helpful; the inability to decide at a reasonable pace is destructive.

It is thus apparent that Mr. Frazier continues to be the most significant roadblock to solving this problem. The most efficient chair imaginable cannot move cases if a member just refuses to vote. The case management problem can be laid very largely at Mr. Frazier's door. Based on this record this Committee must ask what can be done to overcome the resistance to change despite three GAO reports. Surely, 89 pending cases on a single issue with costs of up to \$21,000 per case is not an example of petty cash problems. It is clearly something the Senate should consider in reaching a decision about whether to endorse or reject this performance record.

We strongly suggest that the clearest signal of Senate displeasure that can be sent is to deny Mr. Frazier a reappointment and end this costly period of the Authority's history.

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A second question we recommend you examine is the leadership provided the program during Mr. Frazier's tenure. Leadership involves the ability to pick a direction and give appropriate and clear guidance to the parties in moving toward that goal. It is measured by the clarity of the message, the reaction of the parties and the courts, and the support received from the professional community.

Under Mr. Frazier's stewardship, the FLRA failed on all counts. The most startling evidence in this area comes from the SFLRP survey. Sixty percent of the labor and management respondents to this 1985 survey said the FLRA has been "not particularly consistent" in its development of the law. When we looked behind that attitude we found the reasons why. In the period immediately preceding Mr. Frazier's appointment as Acting Chairman the Authority upheld its ALJ's in 79% of their decisions. Similarly, arbitrators were upheld 66% of the time. These statistics are based on Volume 16 of the Authority's decisions. These numbers show that, although still developing, case law was fairly clear and predictable.

Then, by Volume 19, Acting Chairman Frazier had turned these numbers upside down. A review of the decisions shows he personally voted to reverse ALJ decisions 73% of the time and arbitrators 87% of the time. This is unprecedented in the entire area of administrative law to our knowledge. Without any concern for whether these cases were pro-union or pro-management, it is clear they are being received by practitioners as a message that settled case law is up for

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grabs and issues, previously understood, now need to be relitigated. At \$21,000 a case Mr. Frazier has been a costly appointment. His personal habits are too expensive for these times.

Lest anyone be left with the thought that perhaps Mr. Frazier is right and everyone else is wrong, we looked into how the courts have treated FLRA decisions during this time. Since July of 1984, the courts have overturned, remanded, or otherwise refused to support FLRA decisions 28% of the time. By contrast, during the same period, the NLRB's decisions were rejected by the same courts only 6% of the time. The obvious message from this to the practicing community is not simply that the Authority's decisions are being reversed at an unprecedented rate, but that with a nearly 1 in 3 chance of winning, a party who lost at the Frazier FLRA is well-advised to move to the courts. Naturally, this will raise case processing costs even higher.

Ironically, in one recent decision the court squarely faced the situation where the Authority reversed several of its ALJ's on an issue. The court sided with the ALJ's, stating that the FLRA's decision was not supported "by substantial evidence" and was an "unexplained departure from precedent." (NTEU v. FLRA, 774 F.2d 1181 (D.C. Cir. 1985)). In recent months the courts have criticized FLRA as "clearly incorrect," failing "even to consider the relevant issues," (ACT V. FLRA, 156 F.2d 172 (D.C.

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Cir. 1985)), straining "the language of the statute at every term," and running "counter to the undisputed evidence." (NTEU v. FLRA, supra).

Acting Chairman Frazier's leadership has been marked by confusing the labor-management community about the direction of the law while experiencing an unprecedented rate of reversals by the courts. Only a palareader could tell you the future of a case today. That may mean a period of full employment for lawyers as the community relitigates previously settled issues, but it will be at the expense of the U.S. Treasury. If, as the courts have said, the FLRA repeatedly fails to explain its reversals of precedent, it strains the imagination to say that the Authority is leading this program in a direction beneficial to the government.

The final question to which we direct your inquiry is Mr. Frazier's professional behavior while at the Authority. It is our opinion that he has run the Authority without regard to his responsibility to other members and that he displayed a double standard when evaluating his own behavior versus that of his colleagues. There is no reason to believe this will not continue and further damage the Authority at public expense.

As you are probably aware, when Member McGuinnis left the Authority, he publicly denounced Mr. Frazier. He said he had to constantly fight to overcome "the acting Chairman and his entrenched staff." This comes as no surprise. Not only did

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acting Chairman Frazier force Member McGuinnis to go through 15 steps to decide a case, but Frazier kept information from McGuinnis. McGuinnis revealed Frazier had even denied him access to agency budget information. Furthermore, GAO found that Frazier had decided, after consulting only with a staff member, that 89 cases would not be put before Member McGuinnis for a vote. McGuinnis was never told of this decision. This example outlines the essence of Mr. Frazier's approach to Authority business. He acts as if the FLRA is his domain and his staff outranks Presidentially appointed members; with the apparent rationale that only he really knows and understands the "federal sector." As a result, he is justified in doing whatever is necessary to keep his visor alive.

A different type of abuse arose at an earlier time. In connection with the PATCO decisions it is well known that Member Frazier reported Member Applewaithe to the FBI for an alleged illegal ex parte communication with a union president unconnected with the case. Yet, many forget that Member Frazier also had two ex parte conversations about the same case--one with Secretary Lewis, the actual management party to the case and one with the AFL-CIO representative appointed to settle the case. In neither case did Mr. Frazier report these incidents to the FBI. Instead, he called in one of his staff and asked if the staff member agreed these conversations by Frazier were acceptable. The staff member agreed and Frazier considered it closed.

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As we said at the outset, we believe reconfirmation should not be automatic, but should be earned. We emphatically believe that Mr. Frazier has not earned this honor. During his tenure, including particularly his time as acting Chairman, cost and case processing timeframes have climbed to laughable heights, the courts have reversed the Authority at more than four times the rate they have reversed the NLRB, and staff members have been given more information and decision-making power than the other presidentially appointed members. Our statement has not been about the substance of his decisions or his treatment of unions. We are not here with a replacement candidate at the ready. We know that the President could very well appoint someone to replace him who could do unions even more harm. Yet, with two confirmed members the Authority can continue to operate and the new Chairman can begin to get control over the staff. The ways of the Executive Order which Hank Frazier brought with him can finally be put aside and the law can begin to adapt to the 1980's. We strongly urge the Senate to reject this nomination.

FDF/prw/1544N



NATIONAL ASSOCIATION OF GOVERNMENT EMPLOYEES

AFFILIATED WITH SERVICE EMPLOYEES INTERNATIONAL UNION, AFL/CIO

1313 "L" STREET, N.W., WASHINGTON, D.C. 20005
202/371-6644

TESTIMONY OF THE

NATIONAL ASSOCIATION OF GOVERNMENT EMPLOYEES

TO THE

SENATE GOVERNMENTAL AFFAIRS COMMITTEE

REGARDING

RECONFIRMATION OF HENRY B. FRAZIER III
AS MEMBER OF THE FEDERAL LABOR RELATIONS AUTHORITY

JULY 16, 1986

The National Association of Government Employees is an affiliate of the Service Employees International Union, (AFL-CIO). We appreciate this opportunity to present our views on the reconfirmation of Henry B. Frazier to the Federal Labor Relations Authority.

The National Association of Government Employees is vigorously opposed to Mr. Frazier's renomination. His record with the Authority has been one of failure and mismanagement. The FLRA has failed miserably in performing it's statutory mission. Respect for it's leadership among employees, unions, and management officials is at a dangerously low level. Mr. Frazier has been the dominant force at the Authority since it's inception, and must take a major share of responsibility for it's poor performance. Incidents of "questionable practices" by Frazier have further damaged the Authority's credibility. The Committee should send a clear signal that it will no longer tolerate the FLRA's record of failure by rejecting the nomination of Henry Frazier.

Since it's inception the FLRA has been plagued with ineptitude, controversey and questionable practices which have resulted in a crisis of credibility for the federal labor relations program. A recent survey of the Society of Federal

Labor Relations Professional, which is made up of Labor, Management, and Neutral professionals demonstrated that large numbers of all professionals gave the FLRA low grades in every, single category surveyed, including quality, clarity and timeliness of decisions.

In addition to the overwhelming criticism from labor relations professionals and employees, the FLRA has been soundly criticized by Courts on several occasions for it's ineptitude. The Court of Appeals has on a number of occasions chastized the Authority for the "quality" of it's decision making, citing obfuscated reasoning, insufficient rationale, and the failure to address prior inconsistent decisions. The Court has also chastized the Authority for the "quantity" of it's decision making. The Authority's ineffective administrative procedures have lead to a huge backlog of cases and inordinate delays in the issuance of decisions. In short the Authority during Fraizer's tenure has been inexplicably slow in making decisions, which have been in most part poorly reasoned, and poorly written. This Committee should send a message to the Authority that it will no longer tolerate the negligence, shoddy workmanship, and lack of leadership that has characterized that Agency during Mr. Fraizer's tenure.

Mr. Frazier has been the dominant figure in federal labor relations virtually since it's inception. He has been a Member of the FLRA since it's founding and was also with the Federal Labor Relations Council which was the predecessor of the Authority. As the one constant figure since the establishment of the FLRA Frazier must accept much of the responsibility for the abysmal record of the Authority.

Mr. Frazier has also been cited on at least two occasions for "questionable practices" which have contributed to the general low esteem in which the Authority is viewed. A GAO report entitled "Deficient Management Practices at the FLRA" criticized Frazier for the unauthorized procurement of furniture at exorbitant prices. In addition the Court of Appeals in the PATCO case (PATCO v. FLRA 485 F2d 547 (1982)) chastized Frazier for his improprieties and indiscretions during the PATCO case. The following is some language taken from that decision.

"We have an even more distressing picture of Agency decision makers - whose role in this formal adjudication concededly approximated that of judges, seemingly ignorant of the substance of ex parte rules, insensitive to the compromising potentialities of certain official and social contacts, and

unwilling to silence peremptorily and firmly improper discussion that did transpire.

The two incidents give evidence of a lack of judgement, on Mr. Frazier's part. This - - - characteristic - - - judgement is so crucial to the performance of the duties of the quasi-judicial role for which he seeks reappointment. Judgement is particularly important in the volatile field of labor/management relations where "neutrals" such as Mr. Frazier must be free from even the appearance of impropriety.

Finally the decisions during the Fraizer tenure have been pro management, anti-employee, and have narrowed the scope of bargaining in the federal sector. As a result, the federal labor relations program has suffered greatly. Collective bargaining as a means of addressing employee/management differences has all but disappeared, to be replaced by expensive time consuming litigation.

Mr. Frazier's record demands that he be rejected for reconfirmation to this crucial position.

We thank this Committee for this opportunity to testify on this important topic.



OFFICE OF THE CHAIRMAN

UNITED STATES OF AMERICA
FEDERAL LABOR RELATIONS AUTHORITY

WASHINGTON, D. C. 20424

July 21, 1986

Mr. David Mulgrew
Committee on Governmental Affairs
Subcommittee on Civil Service,
Post Office and General Services
601 Senate Hart Office Building
Washington, D.C. 20510

Dear Mr. Mulgrew:

Enclosed please find two (2) copies of the information you requested Friday. The first document shows administrative case closings over the last three (3) fiscal years, and is largely drawn from the cited GAO report. For your convenience we have totaled the various categories of cases, and explained a few minor discrepancies.

The second document is a complete listing of the litigation status of the seventy-eight (78) cases appealed to the courts which were issued in FY-85. The cover sheet dated 21 July totals and summarizes that information. The "Comments" section provides a brief description of the FLRA action in each case.

I hope this is responsive to your request. If I can be of further assistance, please call me at 382-0731.

Sincerely,

A handwritten signature in cursive script, reading "Kenneth W. Goshorn".

Kenneth W. Goshorn
Director of External Affairs

Enclosures



UNITED STATES OF AMERICA
FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D. C. 20424

July 21, 1986

OFFICE OF THE CHAIRMAN

ADMINISTRATIVE CASE CLOSINGS - MERITS/PROCEDURAL/TOTAL

	<u>FY83</u>	<u>FY84</u>	<u>FY85</u>
ULP	105/59/164 ¹ / ₁	124/57/181	240/53/293
ARB	68/59/127	264/54/318	237/41/278
NEG	80/62/142 ¹ / ₁	103/70/173	138/60/198
REP	90 ² / ₂ /4/94	62/8/70	41/9/50
MISC ³ / ₃	9/0/9	8/0/8	3/0/3
<u>TOTALS:</u>	352/184/536	561/189/750	659/163/822

¹/ GAO figures reflect 1 more ULP and 1 less nego. closing than do FLRA figures.

²/ GAO shows 80 Rep. merits closings, but correct figure is 90. Possible typo.

³/ Miscellaneous cases are policy & guidance and Foreign Service cases, all of which were merits closings.

SOURCE:

GAO/GGD86-57, "Report to the Chairman, Committee on Post Office and Civil Service House of Representatives.
pp. 20, 22, 23-24.



UNITED STATES OF AMERICA
FEDERAL LABOR RELATIONS AUTHORITY
 WASHINGTON, D.C. 20424

JULY 21, 1986

RESULTS OF FLRA DECISIONS ISSUED IN FY 85
 FOR WHICH REVIEW WAS SOUGHT IN FEDERAL COURTS

	Decision Favorable to FLRA	Decision Unfavorable to FLRA	Mixed Result	Appeal Withdrawn	Case Remanded w/o Decision	Pending In Court
ULP (44)	4	4	1	9	4	22
NEGOT. (29)	3	4	0	5	4	13
ARB (5)	1	0	0	1	0	3
TOTAL (78)	8	8	1	15	8	38



NATIONAL LABOR RELATIONS BOARD

Washington, DC 20570

30 July 1986

The Honorable Ted Stevens
 Committee on Governmental Affairs
 Subcommittee on Civil Service, Post
 Office, and General Services
 Washington, D.C. 20510

Dear Senator Stevens:

This will acknowledge your 21 July 1986 letter in which you requested that we supply Mr. David W. Mulgrew of your staff with information which he would specify concerning the National Labor Relations Board. You indicated you wished to have this information in connection with a hearing you are chairing on the renomination of a Member of the Federal Labor Relations Authority.

Before responding to certain specific questions which Mr. Mulgrew subsequently posed in discussions with this office regarding the Board's operations, a few general observations regarding the purposes and functions of the National Labor Relations Board may be helpful. The National Labor Relations Act was enacted in 1935 and amended in major respects in 1947 and 1959. The Act seeks to protect the right of workers to self-organization, to form, join or assist labor organizations, to bargain collectively through representatives of their own choosing, to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and to refrain from any or all such activities except as affected by a union-security agreement. The Board has two primary functions: 1) to determine through secret-ballot elections whether employees wish to be represented by a union for purposes of collective bargaining; 2) to prevent and remedy unfair labor practices by either employers or unions.

As provided under the statute, the Board functions in a quasi-judicial manner, with the investigation and prosecution of unfair labor practice charges the responsibility of an independent General Counsel who is appointed by the President with the advice and consent of the Senate. So far as unfair labor practice charges are concerned, the Board decides those cases prosecuted before it by the General Counsel. The Board has delegated to the General Counsel responsibility for obtaining compliance with and enforcement of the Board's decisions and orders, the great majority of which come to the Board following a hearing before an Administrative Law Judge. After a hearing before the Judge, at which time all parties are afforded an opportunity to adduce evidence in support of their respective positions, the Administrative

Law Judge issues a decision and recommended order. Such decision is subject to review by the Board upon the filing of exceptions with the Board.

The Board recently celebrated its 50th anniversary, and during those 50 years the Board has often reviewed and refined its procedures. Recent problems have resulted from a rate of turnover among Board Members since 1979 which has been unusually high, but these problems are being overcome so that the Board has been able to maintain its reputation as a highly effective Government agency.

The answers to the specific questions Mr. Mulgrew posed follow seriatim:

1. How often does the Board overturn decisions by its Administrative Law Judges?

During FY 1985, the Board adopted completely or with minor modification the findings of its Administrative Law Judges 87.6% of the time. The Administrative Law Judges were partially reversed 3.4% of the time, more substantially reversed 0.9% of the time and completely reversed in 8.1% of the cases.

2. What percentage of the Board's Decisions involve a subsequent proceeding before a United States Circuit Court of Appeals? How successful is the Board in obtaining enforcement of its Decisions and Orders?

With respect to the first part of your question, the Board does of course keep statistics on the number and results of proceedings in the courts of appeals each year. These figures cannot be translated into percentages of Board decisions, however, because the cases issued in one year may involve a court proceeding that year or the next year or even later. Our best estimate is that approximately 25% of the Board's decisions require subsequent action through the agency's Division of Enforcement Litigation.

As to the second part of the question, focusing just on the percentage of Board orders affirmed by the courts of appeals in full, the cumulative figure from 1935 through 1982 was 63.6%. Fiscal Year 1985 was the Board's most successful year in obtaining enforcement, when 83.5% of the Board's orders were affirmed in full.

3. How effective is the National Labor Relations Board in settling cases?

Throughout its history, the Board has pursued a policy which strongly favors settlement over litigation. During Fiscal 1985, 94.4% of the Agency's meritorious cases were settled without the necessity of a Board decision.

4. How long does it take to process a case from filing of charge to Board Decision and Order?

Historically, in those relatively few cases in which a Board decision is required, the median days elapsed from filing of charge to Board Decision has been just short of a year. Because of the turnover alluded to above, however, this figure has recently increased. For Fiscal Year 1985, preliminary data indicate that the median time from filing of charge to Board Decision was 661 days. The Board is making every effort to return to the historical median as soon as possible.

5. What is the size of the work force which is covered by the National Labor Relations Act?

The Board, in general, exercises jurisdiction over employers in the private sector whose operations affect interstate commerce, and over the United States Postal Service. The Act specifically excludes railways and airlines and their employees, the United States or any wholly-owned Government corporation or any Federal Reserve Bank or any state or political subdivision thereof and their employees, agricultural laborers, individuals in domestic service in a home, individuals employed by a parent or spouse, independent contractors, or supervisors. The Board has no data to indicate the number of employees covered by the Act.

6. Have there been any surveys by professional associations of industrial relations experts which purport to rate the effectiveness of the National Labor Relations Board?

I am aware of no particular survey. However, in 1976 the Chairman's Task Force on the NLRB, comprised of representatives of both labor and management as well as industrial relations experts with an academic background, was established to study the Board's case-handling machinery in the processing of unfair labor practice charges and representation cases. In its report to the Board, which contained a variety of recommendations for improving the processing of cases, the task force concluded that "... we have come away from our endeavors with a healthier respect than ever for the efficiency and fairness of one of the Federal Government's most effective agencies."

Please let me know if you need any further information.

Sincerely,

John C. Truesdale
John C. Truesdale,
Executive Secretary